

No. 8638

Vol 1981

In the United States  
Circuit Court of Appeals  
For the Ninth Circuit. /

LIQUID VENEER CORPORATION, a corporation,  
Appellant,

vs.

LENA G. SMUCKLER, doing business as FRENCH  
VENEER MANUFACTURING COMPANY,  
Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the  
Southern District of California, Central Division.

FILED

MAR 3 - 1936

PAUL P. O'BRIEN,  
CLERK



In the United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys.**

For Appellant:

BICKSLER, PARKE & CATLIN, Esqs.,  
W. G. DANIELSON, Esq.,  
Title Insurance Building,  
Los Angeles, California.

PAUL V. SHEEHAN, Esq.,  
1712 Liberty Bank Building,  
Buffalo, New York.

For Appellee:

HARRY GRAHAM BALTER, Esq.,  
440 Van Nuys Building,  
Los Angeles, California.

United States of America, ss.

To LENA G. SMUCKLER, doing business as FRENCH  
VENEER MANUFACTURING COMPANY

Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 18th day of January, A. D. 1936, pursuant to Order allowing appeal filed December 1935 in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled LENA G. SMUCKLER, doing business as FRENCH VENEER MANUFACTURING COMPANY, plaintiff, vs LIQUID VENEER CORPORATION, a corporation, Defendant, No. 5558-C, wherein defendant LIQUID VENEER CORPORATION, a corporation, is appellant, and you are Appellee to show cause, if any there be, why the Judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable GEO. COSGRAVE, United States District Judge for the Southern District of California, this 19th day of December, A. D. 1935, and of the Independence of the United States, the one hundred and Sixtieth.

Geo. Cosgrave

U. S. District Judge for the Southern District of  
California.

[Endorsed]: Copy of this citation received and acknowledged this 19 day of December 1935 Harry Graham Balter Attorney for Lena G. Smuckler, plaintiff and appellee Filed Feb 13 1936 R. S. Zimmerman, Clerk, By Edmund L. Smith, Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA IN AND FOR THE  
COUNTY OF LOS ANGELES.

---

LENA G. SMUCKLER, doing )	
business as FRENCH VENEER :	
MANUFACTURING COM- )	332470
PANY, :	
Plaintiff, )	
:	COMPLAINT.
:	
-vs- )	(Libel)
LIQUID VENEER CORPORA- )	
TION, a corporation, :	
Defendant. )	

---

Comes now the plaintiff and for cause of action against the defendant alleges, as follows, to-wit:

I.

That at all times herein mentioned the plaintiff was, and now is, a resident of the City of Los Angeles, County of Los Angeles, State of California.

II.

That at all times herein mentioned, LIQUID VENEER CORPORATION was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York.

## III.

That at all times herein mentioned the plaintiff has been doing business under the fictitious name and style of FRENCH VENEER MANUFACTURING COMPANY, and has duly recorded said fictitious name in the manner prescribed by the laws of the State of California.

## IV.

That the plaintiff, for many years last past, has been engaged in the preparation and/or manufacture and sale and exploitation of a furniture and automobile polishing preparation, and has exploited said product, sold said product and distributed said product under the style and sales name of "French Veneer," and that as such she has established a large and profitable business in the manufacture and/or sale and/or exploitation and/or distribution of the said product.

## V.

That the defendant, LIQUID VENEER CORPORATION, a corporation, has for many years last past been engaged in the manufacture and/or sale and/or distribution of a furniture polish under the style and/or label of Liquid Veneer.

## VI.

That for a long time prior to this date, the defendant has continuously and systematically and for the purpose of injuring the reputation and the business conducted by this plaintiff, caused letters to be mailed to various customers of this plaintiff for the purpose of destroying the business relations that existed between plaintiff and her customers, and that said letters were written for the purpose of wilfully and maliciously injuring the good

name of the plaintiff and for the further purpose of destroying the business that plaintiff has established in the State of California and elsewhere, and that within one year last past the defendant, in furtherance of its plan and scheme to injure and destroy the plaintiff's good name and reputation did wilfully and maliciously compose, publish and cause to be published a letter addressed to Young's Market Company at Los Angeles, California, which letter reads as follows:

“LIQUID VENEER CORPORATION

London, England—Bridgburg, Canada.

Manufacturers of

HOUSEHOLD AUTOMOTIVE SPECIALTIES

---

Buffalo, N. Y.

U. S. A.

June 2, 1931.

YOUNG'S MARKET,

7th Street,

Los Angeles, California.

ATTEN. General Manager

Gentlemen:—

Our inspector reports your selling and offering for sale a product called “French Veneer”, this is to inform you that our attorneys have advised us this is a flagrant violation of our trademark “Liquid Veneer” as well as our common law rights.

We recently found this product on sale at the May Company. We have explained our position to the May

Company and they have taken the product off sale and have promised that they will no longer sell it. You perhaps know, or you can ascertain from any patent attorney, that the sale of an infringing product by a dealer or jobber, is looked upon in the United States District Courts as contributory infringing, and such dealer or jobber is equally liable with the manufacturer of the product.

We have had more or less difficulty with these people who manufacture this so-called "French Veneer," have tried to purchase evidence against them individually, but they moved around from one place to another, denied their identity when we did catch up with them and after investigating them found their financial condition such as would not warrant litigation.

It is a different matter, however, where we find a responsible house, like yourselves, handling an infringing product, because at the end of a law suit we will be able to collect damages as well as secure a permanent injunction restraining you from ever again selling or offering for sale said infringing goods.

When a manufacturer induces you to sell his infringing product, he is selling you a lawsuit. We are not in business to sue people, we much prefer doing them a favor, but you will see that we are only endeavoring to protect our property, just as you or anyone would do if in our position. We therefore request that you immediately discontinue the sale of this infringing product and advise us to that effect promptly.

The manufacturer of this product if desirous of building a business rightfully his own, could easily choose many names without taking part of a name belonging to some-



one else, who has spent a fortune in building up their business under that name.

His object for adopting the name "French Veneer" is obvious. He is trying to trade on our rights. We have evidence now of the innocent housewife purchasing "French Veneer" which she had been using for years. This housewife on finding that she had purchased the wrong Veneer returned it to the May Company and received the proper genuine "Liquid Veneer".

We will await your prompt reply, and remain, meanwhile,

Yours very truly,

LIQUID VENEER CORPORATION.

MARTIN J. CABANA

Vice President."

## VII.

That by the foregoing false, malicious and defamatory language, the defendant, Liquid Veneer Corporation, intended to and did convey the meaning that the plaintiff had infringed upon a right that the defendant, Liquid Veneer Corporation, was exclusively possessed of, and that the plaintiff was wrongfully and unlawfully selling a product to said Young's Market and other numerous customers of plaintiff, and that the plaintiff moved around from one place to another so that she could not be found, and that when found that she denied her identity and that the Plaintiff was further irresponsible, both financially and otherwise, and that she was not a fit person to do business with, and that by reason of said false and malicious letters aforementioned, said Young's Market and other numerous customers of the Plaintiff, refused to carry on or do any business with the plaintiff and by rea-

son of the facts of the defendant aforementioned, plaintiff and her business have been damaged.

### VIII.

That at the time of the commission of the grievances, herein mentioned, the plaintiff had always maintained a good reputation and credit.

### IX.

That the statements contained in the communications addressed by the defendant, Liquid Veneer Corporation, were false, malicious and untrue, and were made only for the purpose of destroying the good name and reputation and business of this plaintiff, and that by reason of the said false, malicious and defamatory publication aforesaid, plaintiff has been and is greatly injured and prejudiced, and that the reputation of her business has been prejudiced and injured and she has lost and been deprived of great gain and profit which would otherwise have arisen and accrued to her in her said business, all to her damage in the sum of ONE HUNDRED THOUSAND (\$100,000.00) DOLLARS.

WHEREFORE, plaintiff prays for judgment as follows:

1. In the sum of ONE HUNDRED THOUSAND (\$100,000.00) DOLLARS for damages actually suffered.
2. For such sum that the court may deem just and equitable in the form of exemplary and/or punitive damages.
3. For her costs and disbursements herein incurred.
4. For such other and further relief as the Court may deem just and equitable in the premises.

Elijah M. Smuckler  
Attorney for Plaintiff.

STATE OF CALIFORNIA       )  
COUNTY OF LOS ANGELES ) ss.

LENA G. SMUCKLER being by me first duly sworn, deposes and says: that she is the Plaintiff in the above entitled action; that she has read the foregoing Complaint and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

LENA G. SMUCKLER.

Subscribed and sworn to before me this 4th day of November, 1931

[Seal]

ELIJAH M. SMUCKLER

Notary Public in and for the County of Los Angeles,  
State of California.

(ENDORSED): No. 332470 COMPLAINT Filed  
1931 Dec 17 P. M. 3:41 L. E. Lampton County Clerk By  
W. L. Greene Deputy

IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA IN AND FOR THE  
COUNTY OF LOS ANGELES.

LENA G. SMUCKLER, doing business )	
as FRENCH VENEER MANUFAC- )	
TURING COMPANY, )	
	Plaintiff )
	) 332470
vs )	
	)
LIQUID VENEER CORPORATION, )	
a corporation, )	
	Defendant. )

WHEREAS, the above named plaintiff has commenced or is about to commence an action in the Superior Court of the State of California, in and for the County of Los Angeles, against the above named defendant; said action being based upon alleged libel, uttered and published by said defendant against said plaintiff, and

WHEREAS, said LENA G. SMUCKLER is required to furnish bond in the sum of FIVE HUNDRED (\$500.00) DOLLARS, as security for the payment of any and all costs which may be awarded against her in the prosecution of said action.

NOW, THEREFORE, the condition of this obligation is such that if the said action be dismissed or the defendant recover judgment that S. S. Wolfson and M. Lowis of the County of Los Angeles, State of California

do hereby jointly and severally undertake and promise to pay such costs and charges as may be awarded against the plaintiff by judgment or in the process of the action, or on an appeal not exceeding the said sum of FIVE HUNDRED (\$500.00) DOLLARS, to which amount we acknowledge ourselves jointly and severally bound.

S. S. Wolfson

M. Lewis

STATE OF CALIFORNIA,       )  
  ) SS.  
COUNTY OF LOS ANGELES. )

S. S. WOLFSON and M. LOWIS the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says: that he is a resident and free holder in the County of Los Angeles, State of California, and is worth the sum of FIVE HUNDRED (\$500.00) DOLLARS in said undertaking specified over and above of his just debts and liabilities exclusive of property exempt from execution.

S. S. WOLFSON

M. LOWIS

Subscribed and sworn to before me this 28th day of November, 1931.

[Seal]

ELIJAH M. SMUCKLER

Notary Public in and for said County and State.

(ENDORSED): No. 332470 BOND Filed 1931 Dec 17 PM 3 41 L. E. Lampton, County Clerk, By W. L. Greene, Deputy.

IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA IN AND FOR THE  
COUNTY OF LOS ANGELES.

LENA G. SMUCKLER, doing business )	
as FRENCH VENEER MANUFAC- )	
TURING COMPANY, )	
	Plaintiff, ) No. 332470
	)
vs. )	PETITION
	)
LIQUID VENEER CORPORATION, )	
a corporation, )	
	Defendant. )

---

PETITION OF THE DEFENDANT FOR RE-  
MOVAL TO THE DISTRICT COURT OF THE  
UNITED STATES, IN AND FOR THE SOUTH-  
ERN DISTRICT OF CALIFORNIA, CENTRAL  
DIVISION

TO: The Honorable Superior Court of the State of Cali-  
fornia, in and for the County of Los Angeles:

Your petitioner, appearing specially herein for the purpose only of petitioning this Honorable Court to remove this cause to the District Court of the United States, in and for the Southern District of California, Central Division, and without in any wise submitting its person to the jurisdiction of this Honorable Court, or of the District Court of the United States, in and for the Southern District of California, Central Division, respectfully shows to this Honorable Court:

## I.

That the plaintiff is now, and at the time of the commencement of this action was, a citizen and resident of the County of Los Angeles, State of California.

## II.

That your petitioner herein is now, and at the time of the commencement of this action was, a corporation organized and existing under and by virtue of the laws of the State of New York, as alleged in Paragraph II of said complaint.

## III.

That the above entitled action was commenced against your petitioner in the Superior Court of the State of California, in and for the County of Los Angeles, which said action is of civil nature.

## IV.

That defendant files this, its petition for removal of the said cause from the Superior Court of the State of California, in and for the County of Los Angeles, in which it is now pending, to the District Court of the United States, in and for the Southern District of California, Central Division, held in the City of Los Angeles, State of California.

## V.

That no service of summons and complaint has been made upon your petitioner, whether personally or by publication. In this connection, your petitioner is informed and believes, and therefore alleges that plaintiff has made an attempted and purported service of summons and complaint upon your petitioner by serving the same upon the Secretary of State of the State of California, with direc-



tions to said Secretary of State to deliver one copy thereof to C. E. Mack, 1890 Grove Street, San Francisco. Your petitioner shows to this Honorable Court that the said pretended service of summons upon the said Secretary of State of the State of California was not service of summons upon your petitioner, and your petitioner further shows that in petitioning for the removal of the said cause to the District Court of the United States, in and for the Southern District of California, Central Division, your petitioner has appeared specially, as aforesaid, for the purpose only of petitioning for said removal, and without in any way submitting itself to the jurisdiction either of this Honorable Court or of the said District Court of the United States, in and for the Southern District of California, Central Division, and reserving to itself the right after removal of said cause to the District Court of the United States in and for the Southern District of California, Central Division, of specially appearing therein and moving said Court to quash, vacate and set aside the alleged and pretended service of summons and complaint upon your petitioner herein.

#### VI.

That plaintiff brings this action at law for the purpose of obtaining judgment for damages in the amount of One Hundred Thousand Dollars (\$100,000) and punitive damages alleged to have been sustained by plaintiff by reason of alleged false, malicious and defamatory publications by defendant of certain letters set forth in the complaint herein.

#### VII.

That the matter in dispute exceeds the sum of Three Thousand Dollars (\$3,000), exclusive of interest and costs.



## VIII.

That the controversy herein is now and was at the time of the commencement of the said suit, one wholly between citizens of different states, to wit, between plaintiff herein, a citizen and resident of the State of California, and your petitioner herein, a citizen and resident of the State of New York.

## IX.

That there is presented herewith a good and sufficient bond as by statute in such cases made and provided, which said bond is in the penal sum of One Thousand Dollars (\$1,000), and is conditioned upon the entering into the District Court of the United States, in and for the Southern District of California, Central Division, within thirty (30) days from the date of the filing of this petition, of a certified copy of the record in this action, and the payment of all costs which may be awarded by said Court, if the said District Court of the United States shall hold this suit wrongfully or improperly removed thereto.

WHEREFORE, your petitioner prays that this Court proceed no further herein, except to approve the bond presented herewith and to make the order of removal as required by law, and to direct a transcript of the record herein to be prepared by the Clerk of this Honorable Court, to be filed with said District Court of the United States, in and for the Southern District of California, Central Division, in the manner and form as provided by law.

GIBSON, DUNN & CRUTCHER,

By Norman S. Sterry,

Attorneys for Liquid Vencer Corporation, appearing  
specially and for the purpose of this Petition only.

[illegible]

NORMAN S. STERRY, being first duly sworn, deposes and says:

That he is an attorney and counsellor-at-law, and a member of the firm of Gibson, Dunn & Crutcher, attorneys for the defendant and petitioner named in the foregoing petition for removal; that the petitioner is a corporation organized and existing under and by virtue of the laws of the State of New York and has no corporate officer within the State of California, and that for this reason affiant makes this affidavit; that affiant has read the foregoing petition and knows the contents thereof to be true of his own knowledge, except as to the matters which are therein stated upon information and belief, and as to those matters that he believes it to be true.

NORMAN S. STERRY

SUBSCRIBED and sworn to before me this 26th day  
of March, 1932.

[Seal]

MARY S. ALEXANDER

Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: Filed Mar. 30, 1932 L. E. Lampton  
County Clerk By M. E. Howard Deputy

THE AETNA  
CASUALTY AND SURETY  
[Emblem] COMPANY  
HARTFORD CONNECTICUT  
MORGAN B. BRAINARD  
President

Premium \$10.00 for the term

IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA IN AND FOR THE  
COUNTY OF LOS ANGELES

---

LENA G. SMUCKLER, doing )		
business as FRENCH VENEER )		
MANUFACTURING CO., )		UNDERTAKING
Plaintiff )		ON REMOVAL
vs. )		
LIQUID VENEER CORPORA- )		No. 332470
TION, a corporation, )		
Defendant. )		

---

KNOW ALL MEN BY THESE PRESENTS: That The Aetna Casualty and Surety Company, as Surety, is held and firmly bound unto Lena G. Smuckler doing business as French Veneer Manufacturing Co., Plaintiff in the above entitled action, her legal representatives, administrators, and assigns, in the sum of One Thousand (\$1000.00) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made it binds itself, its successors and assigns, as the case may be jointly and severally, firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH THAT,

WHEREAS, the above named Defendant has applied by petition to the Superior Court of the State of California, in and for the County of Los Angeles, for the removal of a certain cause therein pending, wherein Lena G. Smuckler doing business as French Veneer Manufacturing Co. is Plaintiff and Liquid Veneer Corporation, a corporation is Defendant, to the District Court of the United States for the Southern District of California, Central Division, for further proceedings on the grounds in said petition set forth, and that all further proceedings in said action in said Superior Court be stayed;

NOW THEREFORE, if the above named Defendant shall, within thirty (30) Days from and after the date of the filing of said petition, enter in said District Court of the United States of America, a duly certified copy of the record in the above entitled action, and shall pay or cause to be paid all costs that may be awarded therein by the District Court of the United States, if such Court shall hold that such action was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to remain in full force and effect.

Dated at Los Angeles, California this 25th day of March, 1932.

[Seal]

THE AETNA CASUALTY AND  
SURETY COMPANY

BY JOSEPH I. JOHNSON  
Resident Vice President

ATTEST M. A. PAGE  
Resident Assistant Secretary



IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA IN AND FOR THE  
COUNTY OF LOS ANGELES

March 30, 1932. Present Hon. Lewis Howell Smith, Judge.

Lena G. Smuckler, etc.,	)	
	)	
Plaintiff,	)	
	)	No. 332470
vs	)	
	)	Dept. 43
Liquid Veneer Corporation, etc.,	)	
	)	
Defendant.	)	

Petition and bond for removal to the United States District Court for the Southern District of California, Central Division, comes on for hearing, E. M. Smuckler appearing as attorney for the plaintiff and Gibson, Dunn et al by Ira C. Powers for the defendant. Said petition is granted.

IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA IN AND FOR THE  
COUNTY OF LOS ANGELES

—oOo—

LENA G. SMUCKLER, doing )	
business as FRENCH VENEER )	No. 332470.
MANUFACTURING COM- )	
PANY,	) ORDER FOR
Plaintiff, )	REMOVAL OF
)	CAUSE TO
vs. )	THE UNITED
)	STATES
LIQUID VENEER CORPORA- )	DISTRICT
TION, a corporation, )	COURT
Defendant. )	

—oOo—

On reading and filing the verified petition of LIQUID VENEER CORPORATION, defendant, for the removal of the above entitled action to the District Court of the United States, in and for the Southern District of California, Central Division, and upon a bond in proper form and with good and sufficient surety being filed in this court, and it appearing to the court that due notice of the filing of said petition and bond for removal has been given to the adverse parties prior to the filing of said petition and bond, and good cause appearing therefor,

IT IS HEREBY ORDERED that the record in the above entitled case be duly certified to the said United States District Court in the manner provided by law;

AND IT IS FURTHER ORDERED that no further proceedings be had in this court in the above entitled action.

DATED: March 30, 1932.

Lewis Howell Smith

Judge.

FILED Mar. 30, 1932. L. E. LAMPTON, County Clerk By M. E. Howard, Deputy.



STATE OF CALIFORNIA        )  
   ) SS  
 COUNTY OF LOS ANGELES    )       No. 332470

I, L. E. LAMPTON, County Clerk and Clerk of the Superior Court, do hereby certify the foregoing copies of documents and orders consisting of

Complaint, Bond on Libel, Notice of filing petition for removal including copies of Petition and Undertaking on removal, Petition for Removal, Bond on Removal, Minute Order of March 30, 1932 granting petition for removal, and formal Order for Removal to the District Court of the United States for the Southern District of California (Central Division) in the action of

LENA G. SMUCKLER, doing business as FRENCH VENEER MANUFACTURING COMPANY VS LIQUID VENEER CORPORATION, a corporation, to be full, true and correct copies of all of the original documents on file in this office, and proceedings of record in said action at the time Order for Removal was filed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Superior Court this 25th day of April, 1932.

[Seal]

L. E. LAMPTON,

County Clerk and Clerk of the Superior Court of the State of California in and for the County of Los Angeles.

By F. P. Chrisman,  
 Deputy.

[Endorsed]: NO. 5558-C Filed Apr 25 1932. R. S. Zimmerman, Clerk, by M. L. Gaines, Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1932, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 7th day of November in the year of our Lord one thousand nine hundred and thirty-two.

Present:

The Honorable GEORGE COSGRAVE, District Judge.

Lena G. Smuckler, doing business as )	
French Veneer Manufacturing Com- )	
pany, )	
Plaintiff, )	
	) No. 5558-C-Law
vs. )	
	)
Liquid Veneer Corporation, a corpo- )	
ration, )	
Defendant. )	

Under date of July 11, 1932, this cause having come before the Court for hearing on motion of Liquid Veneer Corporation, a corp., appearing specially, to quash pretended service of summons, etc., and after argument of counsel appearing at that time having been ordered to stand submitted on briefs to be filed, and points and authorities having been filed, and duly considered by the Court, upon consideration whereof, it is now by the Court ordered that the motion to quash be granted. Exception to plaintiff.

IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA IN AND FOR THE  
COUNTY OF LOS ANGELES

---

LENA G. SMUCKLER, doing  
business as FRENCH VENEER  
MANUFACTURING COM-  
PANY

Plaintiff,

vs.

LIQUID VENEER CORPORA-  
TION, a corporation,  
Defendant.

---

No. 332470

Action brought in  
the Superior Court  
of the County of Los  
Angeles, and Com-  
plaint filed in the  
Office of the Clerk  
of the Superior  
Court of said  
County.

THE PEOPLE OF THE STATE OF CALIFORNIA  
SEND GREETINGS TO: LIQUID VENEER  
CORPORATION, a corporation Defendant.

You are directed to appear in an action brought against you by the above named plaintiff..... in the Superior Court of the State of California, in and for the County of Los Angeles, and to answer the complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles, or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the plaintiff..... will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 17th day of Dec. 1931.

[Seal Superior Court

Los Angeles County]

L. E. LAMPTON,

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By W. L. Greene

Deputy.

W. L. GREENE

## NOTICE

APPEARANCE: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." (Sec. 1014, C. C. P.)

Answers or demurrers must be in writing, in form pursuant to rule of court, accompanied with the necessary fee, and filed with the Clerk.

[Cut]

## STATE OF CALIFORNIA DEPARTMENT OF STATE

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify:

That on the 1st day of March, 1932, duplicate copies of the Complaint and Summons, in the case of LENA G. SMUCKLER, vs LIQUID VENEER CORPORATION, were served on me, as Secretary of State, which copies

were accompanied by the fee of \$5.00 prescribed by Section 406a of the Civil Code of the State of California, and the statement required by said Section of the address of the defendant corporation, to-wit, Buffalo, New York, and also the address of the Pacific Coast Representative, C. E. Mack, 1890 Grove Street, San Francisco, California.

I FURTHER CERTIFY that on the 2nd day of March, 1932, I advised the defendant corporation at the addresses above stated, by prepayed telegram, of the fact of the service upon me of duplicate copies of said Complaint and Summons, and that on said date I deposited in the United States Post Office, at Sacramento, California, a sealed envelop addressed, as above, with postage thereon fully prepayed, including postage for the transmission of said envelopes by registered mail, and that said enveloped each contained a copy of said Complaint and Summons.

I FURTHER CERTIFY that the records of this office do not contain the name of said defendant corporation, or show the location of its offices.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California, to be hereto affixed this 2nd day of March, 1932.

[Grea Seal of  
State of California]

FRANK C. JORDAN,  
Secretary of State.

By Robert V. Jordan,  
Assistant Secretary of State.

[Endorsed]: Filed Dec. 22, 1932 R. S. Zimmerman,  
Clerk By J. M. Horn, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

ANSWER OF DEFENDANT LIQUID VENEER  
CORPORATION.

Comes now the above named defendant, still appearing specially without submitting itself to the jurisdiction of the court, but especially reserving and insisting upon its objection to such jurisdiction as made in its motion to vacate, set aside and quash the pretended service of summons herein, which motion was denied by the court with the privilege reserved to defendant of renewing the same at the time of trial, and especially challenging and denying the jurisdiction of the court over the defendant, and reserving its right to so renew said motion, by way of answer to plaintiff's complaint alleges as follows:

I.

That defendant has no information or belief upon the subject of the matters alleged in paragraph I of the complaint sufficient to enable it to answer thereto, and basing its denial on that ground it denies each and all of the allegations therein contained.

II.

Defendant admits the allegations contained in paragraph II of the complaint.

III.

That as to the allegations contained in paragraph III of the complaint, defendant has no information or belief upon the subject sufficient to enable it to answer thereto, and basing its denial on that ground, denies each and all of the allegations therein contained.

## IV.

That in answer to paragraph IV of the complaint defendant denies that plaintiff has for many years last past, or at all, been engaged in the business of preparation and/or manufacture and/or sale and/or exploitation of the articles therein mentioned, but it admits and alleges that for approximately two (2) years next preceding the month of June, 1931, intermittently and from time to time plaintiff sold and caused to be sold a liquid polishing material designated and called "French Veneer," but denies that plaintiff during said period of time, or at all, had established or possessed a large and/or profitable business in the manufacture and/or sale and/or exploitation and/or distribution of said product French Veneer, and defendant alleges that plaintiff's transactions involving said product were of a nominal nature and never yielded a substantial, or any, profit to her.

## V.

Defendant admits the allegations contained in paragraph V of the complaint.

## VI.

That in answer to paragraph VI of the complaint defendant alleges:

(a) That it denies that for a long time prior to the date of the complaint, or at all, defendant has continuously and/or systematically, or at all, caused letters to be mailed to various customers of plaintiff for the purpose of injuring plaintiff's business or the relations of plaintiff with her customers, and denies that any letters mailed by it to persons who were customers of plaintiff were mailed for the purpose of wilfully and/or wrongfully in-



juring the good name of plaintiff or destroying her business.

(b) That it denies that at any time, or at all, in furtherance of a plan and/or scheme to injure plaintiff's good name and/or reputation it wrote or caused to be written and/or mailed the letter set forth in said paragraph VI.

(c) That it admits that on or about the month of June, 1931, it wrote and mailed a letter concerning the infringement of its trade-mark, "Liquid Veneer," addressed to Young's Market, *by* denies specifically that in writing said letter, or any letter, it was prompted by any malice towards plaintiff, or desire or intent to injure her; and defendant is informed and believes and upon such information and belief alleges the fact to be that the letter set forth in said paragraph VI is not the said letter or any letter written and/or mailed by it.

## VII.

That defendant specifically denies each and all of the allegations, matters and things set forth in paragraph VII of the complaint, save and except that it admits that the letter mailed by it to Young's Market conveyed the meaning that the use of the name French Veneer as applied to a liquid polishing material was an infringement of defendant's trade-mark, "Liquid Veneer."

## VIII.

That defendant denies specifically each and every allegation contained in paragraph VIII of the complaint in so



far as the same alleges or charges that plaintiff had always or at all maintained and/or did at the time stated, or at any other time, maintain a good business reputation and/or credit.

### IX.

That defendant denies that the statements, or any of them, contained in the said, or any, communication addressed by it to Young's Market were either false, malicious or untrue, and denies that said statements, or any of them, were made for the purpose of destroying the good name and/or reputation and/or business of plaintiff, but alleges that any and all such communications were mailed in good faith and for the purpose of protecting defendant's trade-mark, trade name, products and business from wrongful infringement and interference, and its customers from imposition.

Defendant specifically denies that by reason of the publication complained of by plaintiff, or by reason of any publication or publications made by defendant, plaintiff has been greatly or at all, injured in her reputation or business or personally; and further specifically denies that plaintiff has lost or been deprived of great, or any, gain or profit which would otherwise, or at all, have arisen or accrued to her, because of any publication of defendant; and defendant further specifically denies that plaintiff has been damaged in the sum of One Hundred Thousand (\$100,000.00) Dollars, or any sum, or at all, because or on account of the publication complained of by her, or any publication made by defendant.

AS A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE IN MITIGATION DEFENDANT ALLEGES AS FOLLOWS:—

I.

That it repleads and realleges all and singular the matters and things set forth in its foregoing answer and makes the same a part of this defense as fully as though again set forth herein.

II.

That the only letter written and mailed by defendant to Young's Market (whether the same shall prove to be in the words set forth in paragraph VI of the complaint or not) was written and mailed under the following circumstances, to-wit:

(a) That for a period of about thirty (30) years preceding the month of June, 1931, defendant has held, owned and continuously used a trade-mark and trade name duly and regularly issued by and registered in the Patent Office of the United States pursuant to and in accordance with the provisions of the Statutes of the United States applicable thereto, its said trade-mark and trade name being and consisting of the words, "Liquid Veneer," under which defendant had during all of said time manufactured, sold and distributed a liquid polishing material in interstate commerce throughout the United States and other countries under said trade-mark and trade name, "Liquid Veneer," and said polishing material became and is generally known by that name and is so generally known and recognized because of said name as produced and marketed by defendant under said trade-mark and trade name, "Liquid Veneer," and was and is

a very valuable asset of defendant, and the word, "veneer" was and is a material and important designating part of said name.

(b) That for several years prior to the month of June, 1931, some person or persons then unknown to defendant but styling themselves "French Veneer Manufacturing Co." had been intermittently and from time to time selling to various retail merchants in the State of California a liquid polishing material known and labelled as "French Veneer," and which was made up and labelled in imitation of the product of defendant, known as "Liquid Veneer"; that defendant was then, and is now, informed and believes that the use of said name and label, "French Veneer," was and is an infringement of its registered trade-mark and trade name, "Liquid Veneer," and alleges that the name, "French Veneer," applied to a liquid polishing material had a tendency to, and did, lead the purchasing public to believe that the product so labelled and offered under said name was "Liquid Veneer," the product of defendant.

(c) That upon learning of the use of the name "French Veneer," as aforesaid, defendant investigated the source and origin of said product, "French Veneer," and the identity of said French Veneer Manufacturing Co., and as a result of said investigation learned that French Veneer Manufacturing Co., was in fact the plaintiff herein; that thereupon defendant complained to plaintiff of her infringement of its trade-mark and trade name, whereupon she denied and disclaimed responsibility for the origin and marketing of said product, "French Veneer."

That fully believing, notwithstanding the disclaimer of plaintiff, that she was in fact the French Veneer Manufacturing Co., and was responsible for the marketing of said product and the infringement of its trade-mark and trade name, defendant fully and carefully investigated the financial responsibility of plaintiff and her ability to respond in damages for infringement of its said trade-mark, and its rights thereunder, as aforesaid, and prior to the writing and mailing of the letter which it did write and mail to Young's Market, it did learn from reliable and responsible sources, in which it reposed, and still reposes, great faith and confidence, that plaintiff and the said fictitious name and entity, "French Veneer Manufacturing Co.," were and are one and the same, and were and are without financial responsibility, and that they and each of them had been adjudicated bankrupt in the bankruptcy courts of the United States for the Southern District of California, Central Division, and at the time of writing and mailing to Young's Market the letter aforesaid, it in good faith believed that plaintiff had and was infringing its said trade-mark and trade name, and that plaintiff had endeavored to avoid discovery of her identity as the producer and marketer of "French Veneer," and that she had, upon being charged therewith, denied her identity as the person responsible for such production and marketing, and that she was so without financial responsibility; that defendant had no recourse against her at law, and in the light and knowledge of the facts aforesaid, and without malice or purpose to injure plaintiff, but

with the good faith and purpose of protecting itself from loss and injury by infringement of its trade-mark and trade name, and for the purpose of avoiding the necessity for taking legal proceedings against innocent parties, it did write and mail the letter aforesaid, fully believing that it was, and each and all of the statements therein contained were, in every respect true.

AS A FUTHER, SEPARATE AND SECOND AFFIRMATIVE DEFENSE BY PLEA OF THE TRUTH, DEFENDANT ALLEGES AS FOLLOWS:—

#### I.

That defendant repleads and realleges all and singular the matters and things set forth in its answer and first affirmative defense and makes the same a part of this defense as fully as though again set forth herein.

#### II.

That defendant alleges that the matters and things stated in the letter written and mailed by it to Young's Market as aforesaid (whether the same be in the words set forth in paragraph VI of the complaint or not) were and are true; that the manufacture, advertisement and sale by plaintiff of her said product under and by the use of the said trade name and label, "French Veneer," constituted, and constitutes, an infringement of defendant's trade-mark and trade name, "Liquid Veneer," and infringed, and infringes, upon defendant's exclusive rights

under its said trade-mark and trade name, and plaintiff's acts in the manufacture, advertisement, sale and marketing of said product under said name and label, "French Veneer," were wrongful and in violation of defendant's rights; that when defendant endeavored to discover the identity of French Veneer Manufacturing Co., and locate the source of said product, "French Veneer," plaintiff did attempt to avoid discovery and did move her place of business to a new location, and when found and charged with responsibility for using said trade name and label, "French Veneer," denied her identity as French Veneer Manufacturing Co., and disclaimed responsibility for the marketing and selling of said product, "French Veneer," that in truth and in fact plaintiff was at the time of the publication complained of without financial responsibility, and had been theretofore adjudicated, and was then, a bankrupt, and was without financial, or any, credit.

That by reason of the facts aforesaid the publication complained of in the complaint is true.

WHEREFORE, defendant prays that plaintiff take nothing, and that her action be dismissed.

O'CONNOR & DIVET

By A. G. Divet

By J. F. T. O'Connor

STATE OF NEW YORK     )  
 County of ERIE             ) SS.  
 CITY OF BUFFALO         )

Martin J. Cabana being by me first duly sworn, deposes and says; that he is an officer, to wit: the Vice-President of The Liquid Veneer Corporation, a Corporation, the defendant in the foregoing and above entitled action; that he has read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Martin J. Cabana

Subscribed and sworn to before me this 30th day of October, 1933

[Seal]

C. B. McCollum

Notary Public in and for the County of Erie, State of New York.

[Endorsed]: Received Nov. 8, 1933, Pelton, Warne & Balter Attorneys for Plaintiff By Tanner. Filed Nov. 8, 1933. R. S. Zimmerman Clerk By L. Wayne Thomas, Deputy Clerk.



[TITLE OF COURT AND CAUSE.]

*Amendment to Complaint*

Leave of court having first been obtained, plaintiff amends her complaint on file herein in the following respects, to-wit:

II

Amending paragraph II thereof to read as follows:

That at all times herein mentioned, LIQUID VENEER CORPORATION was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York and has been and now is doing business in the State of California.

VI

Amending paragraph VI thereof to read as follows:

That for a long time prior to this date, the defendant has continuously and systematically and for the purpose of injuring the reputation and business conducted by this plaintiff, caused letters to be mailed to various customers of this plaintiff for the purpose of destroying the business relations that existed between plaintiff and her customers, and that said letters were written of and about the plaintiff and for the purpose of wilfully and maliciously injuring the good name of the plaintiff and for the further purpose of destroying the business that plaintiff has established in the State of California and elsewhere, and that within one year last past the defendant, in furtherance of its plan and scheme to injure and destroy the



plaintiff's good name and reputation did wilfully and maliciously compose, publish and cause to be published a letter of and about the plaintiff and addressed to Young's Market Company at Los Angeles, California, which letter reads as follows:

"LIQUID VENEER CORPORATION

LONDON, ENGLAND \*\* BRIDGBURG, CANADA.

Manufacturers of  
HOUSEHOLD AUTOMOTIVE SPECIALTIES

- - - - -

Buffalo, N. Y.

U. S. A.

June 2, 1931

Young's Market,  
7th Street,  
Los Angeles, California.

Gentlemen:—      ATTEN. General Manager

Our inspector reports your selling and offering for sale a product called "French Veneer," this is to inform you that our attorneys have advised us this is a flagrant violation of our trademark "Liquid Veneer" as well as our common law rights.

We recently found this product on sale at the May Company. We have explained our position to the May Company and they have taken the product off sale and have promised that they will no longer sell it. You perhaps know, or you can ascertain from any patent attorney, that the sale of an infringing product by a dealer or jobber, is looked upon in the United States District Courts as contributory infringing, and such dealer or jobber is equally liable with the manufacturer of the product.

We have had more or less difficulty with these people who manufacture this so-called "French Veneer," have tried to purchase evidence against them individually, but they moved around from one place to another, denied their identity when we did catch up with them and after investigating them found their financial condition such as would not warrant litigation.

It is a different matter, however, where we find a responsible house, like yourselves, handling an infringing product, because at the end of a law suit we will be able to collect damages as well as secure a permanent injunction restraining you from ever again selling or offering for sale said infringing goods.

When a manufacturer induces you to sell his infringing product, he is selling you a lawsuit.. We are not in business to sue people, we much prefer doing them a favor, but you will see that we are only endeavoring to protect our property, just as you or anyone would do if in our position. We, therefore, request that you imme-

diately discontinue the sale of this infringing product and advise us to that effect promptly.

The manufacturer of this product if desirous of building a business rightfully his own, could easily choose many names without taking part of a name belonging to someone else, who has spent a fortune in building up their business under that name.

His object for adopting the name "French Veneer" is obvious. He is trying to trade on our rights. We have evidence now of the innocent housewife purchasing "French Veneer" which she had been using for years. This housewife on finding that she had purchased the wrong Veneer returned it to the May Company and received the proper genuine "Liquid Veneer."

We will await your prompt reply, and remain, meanwhile,

Yours very truly,

LIQUID VENEER CORPORATION

MARTIN J. CABANA

Vice President."

Harry Graham Balter

Attorney for Plaintiff

[Endorsed]: Filed May 9, 1935. R. S. Zimmerman,  
Clerk By Francis E. Cross, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

AMENDMENT TO ANSWER OF DEFENDANT  
LIQUID VENEER CORPORATION

COME NOW the defendant above named still appearing specially without submitting itself to the jurisdiction of the Court but especially reserving and insisting upon its objection to such jurisdiction as made in its motion and motions to vacate, set aside and quash the pretended service of summons herein, which motion was denied by the Court with the privilege reserved to the defendant of renewing the same at the time of trial and which motion has been so renewed, and especially challenging and denying the jurisdiction of this Court over the defendant and reserving all rights with reference to the jurisdiction of said Court over this defendant, and leave of Court being first had and obtained, files this its amendment to its answer to plaintiff's complaint on file herein, and as a third, separate, further and affirmative defense alleges as follows:

I.

Defendant refers to paragraph II of its further, separate and affirmative defense in mitigation as contained in the original answer on file herein (said defense being the first, separate and affirmative defense pleaded in said original answer) and incorporates each and every allegation in said paragraph II contained in this its third, separate, further and affirmative defense as if herein repleaded and realleged in full.

## II.

That at all times herein mentioned, Young's Market was a customer of the defendant and a retail distributor of its product, "Liquid Veneer"; that as such customer and such distributor the said Young's Market was in a trade relation with the defendant above named and was interested in its product. That both of said parties were mutually interested in each other by reason of their business relations in the manufacture, sale and distribution of said "Liquid Veneer"; that the defendant's particular and special interest in relation to Young's Market was of such a nature that if the said Young's Market was engaged in distributing or selling a product which, in the honest belief of defendant, was in fact infringing on their product "Liquid Veneer", that it became the duty of said defendant to notify and call to the attention of said Young's Market its potential liability to the defendant for so doing. Conversely, it was in the interest of said Young's Market, as a distributor of "Liquid Veneer" and as a customer of the said defendant and as a distributor of its product, not to handle another product which, on account of the trade name under which such other product was being sold, was or might be an infringement or in violation of the rights of the said defendant or which might subject said Young's Market to liability and damage as a contributory infringer. That therefore, on account of the mutual business interests and relations existing between said parties, the letter as so written was, became, and remained a privileged communication between the parties;

WHEREFORE, defendant prays judgment in accordance with the prayer of its original answer on file herein, of which this amendment is a part.

PAUL V. SHEEHAN, ESQ.,  
Attorney for Defendant  
(Special Appearance Only)  
Office & P. O. Address,  
1712 Liberty Bank Bldg.,  
Buffalo, New York.

STATE OF CALIFORNIA )  
 ) ss.:  
COUNTY OF LOS ANGELES )

PAUL V. SHEEHAN, being by me first duly sworn, deposes and says: that he is the attorney for Liquid Veneer Corporation, a corporation, the defendant in the above entitled action; that he has read the foregoing Amendment to Answer of Defendant Liquid Veneer Corporation and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true;

that there are no officers of said defendant within the State of California and that for that reason affiant makes this verification on behalf of said defendant.

Paul V. Sheehan

Subscribed and sworn to before me this 9th day of May, 1935.

[Seal]

Meredith Koch

Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: Filed May 9, 1935. R. S. Zimmerman,  
Clerk By Francis E. Cross, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

### VERDICT OF THE JURY

We, the jury in the above entitled case, find in favor of the plaintiff, and assess her actual or compensatory damages in the sum of \$11,000.00 dollars (\$.....); and her punitive or exemplary damages in the sum of \$9000.00 dollars (\$.....), making a total of Twenty Thousand dollars, (\$20,000).

Dated: Los Angeles, May 9 1935.  
California,

Geo. M. Adair  
Foreman of the jury.

[Endorsed]: Filed May 9, 1935, R. S. Zimmerman,  
Clerk, By Francis E. Cross, Deputy Clerk.



[TITLE OF COURT AND CAUSE.]

## JUDGMENT.

On the 7th day of May, 1935, this cause came on for trial before the Court and a jury to be therein duly impanelled; Harry Graham Balter, Esq., and Isador I. Smuckler, Esq., appearing as counsel for the plaintiff, and Paul V. Sheehan, Esq., appearing as counsel for the defendant: thereupon a jury was impanelled and sworn as the jury to try this cause; and evidence, both oral and documentary, having been introduced on said day by respective counsel, and on the following days: May 8th and 9th, 1935; and during the trial of this cause certain motions of respective parties having been denied and/or granted as reflected by the minutes of the Court in this trial; and the testimony being closed, the cause, after argument of respective counsel, and the instructions of the Court, was submitted to the Jury for its consideration and verdict; and on the 9th day of May, 1935, the Jury having returned into the Court-room, and having presented its Verdict, which was read by the Clerk, and is as follows, to-wit:

“IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA. CENTRAL DIVISION. Lena G. Smuckler, Plaintiff Vs. Liquid Veneer Corp., a corp., Defendant No. 5558 C. Law. VERDICT OF THE JURY. We, the jury in the above entitled case,



find in favor of the plaintiff, and assess her actual or compensatory damages in the sum of \$11,000.00 dollars (\$.....); and her punitive or exemplary damages in the sum of \$9000.00 dollars (\$.....), making a total of Twenty Thousand dollars, (\$20,000). Dated: Los Angeles, California May 9, 1935. Geo. M. Adair Foreman of the jury.”

and the Court having ordered that said Verdict be filed and entered, and that Judgment be entered accordingly;

NOW, THEREFORE, by virtue of the law and by reason of the premises as aforesaid,

IT IS ORDERED, ADJUDGED and DECREED:

That the Plaintiff, Lena G. Smuckler, doing business as French Veneer Manufacturing Company, do have and recover of and from the Defendant, Liquid Veneer Corporation, a corporation, the sum of Twenty thousand (\$20,000.00) Dollars, together with her, Plaintiff's costs, taxed herein at \$46.42.

JUDGMENT ENTERED AND RECORDED MAY 10th, 1935.

R. S. ZIMMERMAN, Clerk,

By Francis E. Cross,

Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 27th day of September in the year of our Lord one thousand nine hundred and thirty-five

Present:

The Honorable: Geo. Cosgrave, District Judge.

Lena G. Smuckler, doing business	)	
as French Veneer Manufacturing	)	
Company,	Plaintiff, )	
	vs.	) No. 5558-C-Law.
Liquid Veneer Corporation,	)	
	Defendant. )	

This cause having come before the Court on September 9th, 1935, for hearing on Motion of the defendant to set aside verdict and judgment, and for a New Trial, pursuant to Notice filed July 9th, 1935, and argument of counsel thereon having been heard, and said Motion thereupon ordered submitted; the Court, after due consideration, and being now fully advised in the premises, orders said Motion to set aside verdict and for a new trial, denied. Exception to defendant.

[TITLE OF COURT AND CAUSE.]

NOTICE OF FILING AND LODGING BILL OF  
EXCEPTIONS, AND NOTICE OF HEARING  
ON SETTLEMENT OF THE SAME.

TO LENA G. SMUCKLER, plaintiff above named, and  
to her attorneys, HARRY GRAHAM BALTER  
AND ISADOR I. SMUCKLER:

YOU WILL PLEASE TAKE NOTICE that the defendant in the above entitled action filed and lodged in the office of the Clerk of the above entitled Court on the 2nd day of December, 1935, its proposed Bill of Exceptions in said case with the view of having the same settled and made a part of the record on appeal; that a copy of said Bill of Exceptions, with a copy of this Notice, is herewith served upon you.

PLEASE TAKE FURTHER NOTICE that the defendant will bring on for settlement his proposed Bill of Exceptions filed herein on the 2nd day of December, and the amendments proposed thereto by you, if any, on the 16th day of December, 1935, at the hour of 9:30 o'clock A. M., or as soon thereafter as counsel can be heard, in the Chambers of the Hon. Geo. Cosgrave, Judge of the above entitled Court in the Federal Building, Temple and Main Streets, in the City of Los Angeles, and District aforesaid.

DATED: This 2nd day of December, 1935.

BICKSLER, PARKE & CATLIN  
PAUL V. SHEEHAN,

By W. G. Danielson

Attorneys for defendant.

RECEIPT IS HEREBY ACKNOWLEDGED by Harry Graham Balter and Isador I. Smuckler, attorneys for the plaintiff, Lena G. Smuckler, doing business as FRENCH VENEER MANUFACTURING COMPANY, of a copy of the proposed Bill of Exceptions, and a copy of the Notice of the filing of said Bill of Exceptions and of the hearing on the settlement of said appeal, this 2d day of Dec., 1935.

HARRY GRAHAM BALTER  
ISADOR I. SMUCKLER,

By Harry Graham Balter  
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 4, 1935, R. S. Zimmerman,  
Clerk By Robert P. Simpson Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

### BILL OF EXCEPTIONS.

BE IT REMEMBERED that this cause came on for trial before a jury in the Court presided over by the Hon. Geo. Cosgrave, Judge of the above entitled Court, on the 7th day of May, 1935, and continued through and including the days of May 8th and 9th, 1935, on which latter date it was submitted to the jury and verdict returned awarding plaintiff judgment against defendant in the sum of \$11,000.00 general damages and \$9,000.00 punitive damages, the plaintiff being represented by Harry Graham Balter, Esq., and Isador I. Smuckler, Esq., and the defendant being represented by Paul V. Sheehan, Esq.

Prior to the introduction of any evidence upon the merits of the complaint of plaintiff certain proceedings were had in this cause in the nature of motions, filing of affidavits, evidence in defense of motion to vacate and set aside service of summons and to quash the same, objections, orders and rulings of the Court, etc., and which are as follows, to-wit:

### MOTION TO QUASH PRETENDED SERVICE OF SUMMONS ON DEFENDANT.

After order made by the Superior Court of the State of California, in and for the County of Los Angeles, on March 30, 1932, transferring this cause to the United States District Court, and the various papers filed in said Superior Court were certified by the Clerk thereof and filed with the Clerk of this Court on April 25, 1932, the defendant, on May 2, 1932, served and filed its motion to vacate, set aside and quash the pretended service of summons upon the defendant and which motion was sup-

ported by Points and Authorities and is in the following terms, to-wit:

### “MOTION TO QUASH

COMES NOW the defendant, Liquid Veneer Corporation, and appearing specially and for the purpose of this motion only, and without in any manner submitting itself to the jurisdiction of the above entitled Honorable Court, moves the said Court to vacate and set aside the alleged and pretended service of summons upon the said defendant, upon the following grounds:

#### I.

That the said pretended service of summons upon defendant was made on March 1st, 1932, by serving a copy of the complaint and summons upon Frank C. Jordan, Secretary of State of California.

#### II.

That the said defendant was not on the 1st day of March, 1932, or at any time during the year 1932 or prior thereto, and is not now a resident or citizen of the State of California or of the Southern District of California, Central Division, and was not on the 1st day of March, 1932, or at any other time during said year or at any time prior thereto, and is not now transacting or conducting or carrying on any business within the said State of California or the Southern District of California, Central Division; and that the defendant was not on the said 1st day of March, 1932, or at any other time, and is not now subject to the jurisdiction of the above entitled Honorable Court, or to the jurisdiction of any Court, either State or Federal, within the State of California; that said defendant has not authorized the Secretary of State, nor

any deputy of said Secretary of State, nor any other person within the State of California, to represent it, or to receive service of process or summons for or on its behalf.

### III.

That the defendant was not on the 1st day of March, 1932, or at any other time, and is not now, a resident of the State of California or of the Southern District of California, Central Division; nor was said defendant on said 1st day of March, 1932, or at any other time, within the said State of California or the Southern District of California, Central Division, or subject to the jurisdiction of this Honorable Court or of any other Court, or the Superior Court of the State of California in and for the County of Los Angeles, wherein said action was commenced, and has not consented and does not consent to be sued either in said Superior Court of the State of California, County of Los Angeles, or in said Southern District of California, Central Division.

Said motion will be made upon all the files and papers in said cause and upon the affidavits of Martin J. Cabana, Robert V. Jordan and Fred D. Morgan, attached hereto and served and filed herewith.

DATED: Los Angeles, California, April 29th, 1932.

NORMAN S. STERRY,  
GIBSON, DUNN & CRUTCHER,  
BY Norman S. Sterry

Attorneys for defendant Liquid Veneer Corporation, a corporation, appearing specially and for the purpose of this motion only.

In the opinion of counsel the foregoing motion to quash is well taken and is not interposed for purposes of delay.

Norman S. Sterry."



The following affidavits were filed on said May 2nd, 1932, in support of said Motion to Quash.

"AFFIDAVIT OF ROBERT V. JORDAN.

[illegible]

ROBERT V. JORDAN, being first duly sworn, deposes and says:

That he is and at all times herein mentioned was Assistant Secretary of State of the State of California; that on March 1st, 1932, there was received by mail in the office of the Secretary of State of the State of California, in the City of Sacramento, said State, copies of the summons and complaint in the above entitled action. That no process or papers of any kind or character in the above entitled action have been delivered to or received by the said Secretary of State, except as aforesaid.

That there are not now on file, nor have there ever been on file in the office of the Secretary of State any copies of the Articles of Incorporation of Liquid Veneer Corporation, or any statement of Liquid Veneer Corporation of any kind or character, or any designation of any person as the agent of Liquid Veneer Corporation for services of process or authorized to receive service of process, or any consent of Liquid Veneer Corporation to any service or process of any document or paper of any kind or character for or on behalf of Liquid Veneer Corporation. That Liquid Veneer Corporation is not a corporation organized or existing under or by virtue of the laws of the State of California, and is not now and never



has been at any time qualified to do business in the State of California.

ROBERT V. JORDAN

Subscribed and sworn to before me this 21st day of April, 1932.

F. G. FRIEBNOW, JR., (SEAL)

Notary Public in and for the County of Sacramento,  
State of California.

My Com. Exp. 1/19/33."

"AFFIDAVIT OF MARTIN J. CABANA

STATE OF NEW YORK     )  
COUNTY OF ERIE         ) SS  
CITY OF BUFFALO        )

MARTIN J. CABANA, being duly sworn deposes and says:

That he is a resident of the City of Buffalo, County of Erie, State of New York, is executive vice president of Liquid Veneer Corporation, Defendant above named, and is in charge of sales; that said Defendant is a business Corporation duly organized and existing under and by virtue of the laws of the State of New York with an office and principal place of business in the City of Buffalo, New York; that said Defendant is now and has been at all the times herein mentioned engaged in the manufacture and sale of household and automotive specialties, and that, excepting such business as is transacted in the State of New York and in small part abroad, said business is wholly in interstate commerce.

That said Defendant above named is not now, nor has it ever been at any time, engaged in or been doing business in the State of California, nor has it at any time

maintained an office or place of business anywhere within said State; that it has not now, nor has it ever had any officers, or agents in said State; nor has it at any time ever designated or authorized in the State of California any person, firm or corporation whatsoever to accept service of process upon it or otherwise; that at no time has Defendant above named ever had any officers, agents, person or persons upon whom process could be served residing in the State of California, nor has it ever had at any time any property, either real or personal, within said State, excepting goods "in transit". That at no time has the Defendant Corporation ever filed its Articles of Incorporation with the Secretary of State of the State of California or made any effort to qualify itself to do business within the State of California and that it has never designated or authorized the Secretary of State of the State of California, or one E. C. Mack, or any other person within said State of California to receive or accept notices or summonses or other process for or on behalf of said Corporation.

That E. C. Mack, party to whom Plaintiff herein caused certain papers herein to be mailed in the State of California, is not now, was not on the 1st day of March 1932, nor has he ever been prior to or since said date, an officer or agent of Defendant Corporation above named. That said Mack is a traveling salesman only, having no connection with Defendant other than soliciting orders for its products on a commission basis and that he travels in States other than California, including Washington and Oregon.

That Defendant in the course of its business ships on orders received at the home office its products direct from Buffalo, New York, and makes interstate shipments to

persons, firms or corporations in California and elsewhere on the Pacific Coast who desire to order and purchase its products; that some of said shipments while in transit are at times redistributed by public warehouse forwarders to their points of ultimate destination when previously bulked for freight economy on transcontinental journey.

That all orders from customers, wholesalers, jobbers or retailers, are sent to Defendant at Buffalo, received by Defendant at Buffalo, entered in books at Buffalo, are made up in Buffalo, goods therefor shipped from Buffalo and said orders are obtained almost wholly by a mail order system. That Defendant has been in business about forty years and has had for many years a customer trade which orders by mail; that invoices for goods are sent out from Buffalo by mail with bill of lading and thereafter periodically, that all goods are sold on credit; that only at rare intervals are goods sent C.O.D. with sight draft attached to bill of lading; that customers themselves take or cause to be taken from carriers their shipments of goods on arrival at point of destination in California and elsewhere; that all credits, charges and payments for goods are made at Buffalo, New York and nowhere else and all sales shipments are F.O.B. Buffalo.

That Defendant has never transacted any business within said State of California other than the shipment in interstate commerce of its products into said State and the necessary details in connection therewith.

MARTIN J. CABANA

Subscribed and sworn to before me this 21st day of April, 1932.

C. B. McCOLLUM

Notary Public, Erie County, N. Y."

## "AFFIDAVIT OF FRED D. MORGAN

STATE OF NEW YORK     )  
COUNTY OF ERIE         ) SS  
CITY OF BUFFALO        )

FRED D. MORGAN, being duly sworn deposes and says that he is a resident of the City of Buffalo, County of Erie and State of New York, and is an officer to-wit: Secretary and General Manager of Liquid Veneer Corporation, Defendant above named.

That said Defendant is now and was at all the times herein mentioned a Corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office and principal place of business at No. 375 Ellicott Street, in said City of Buffalo. That said Corporation is engaged in the manufacture and sale of household and automotive specialties, its principal product for many years being a furniture polish called "Liquid Veneer"; that, excepting such business as is transacted in the State of New York and foreign in small part, the business of Liquid Veneer Corporation is wholly interstate.

That said Corporation has not now nor did it have prior to, since or on March 1st, 1932, the date upon which papers herein were mailed to the Secretary of State of California as deponent is informed, an office or place of business anywhere within the State of California; that it had no officers or agents in the State of California or elsewhere during any of said times mentioned; that it

had no property, either real or personal in said State of California during the times mentioned excepting occasional merchandise in transit; that at no time has the Defendant above named ever designated any person or persons, firm, or corporation upon whom process could be served within the State of California or elsewhere.

That at no time has the Defendant Corporation ever filed its Articles of Incorporation with the Secretary of State of California or made any effort to qualify itself to transact business within the State of California and that it has never designated, appointed, authorized or otherwise empowered, the Secretary of State of the State of California, E. C. Mack or any other person or persons, or any firm or corporation within said State of California to receive or accept notices or summonses or other process for or on behalf of said Corporation.

That at no time has E. C. Mack, person to whom papers herein were mailed on March 1st, 1932, as deponent is informed, ever been an officer, agent, servant or employee of Defendant Corporation, except that he is a traveling salesman soliciting orders for Defendant's products on a commission basis only. That he travels not only in the State of California but also in the State of Oregon, Washington and elsewhere interstate.

That Defendant's business transacted within the State of California is wholly interstate commerce in that all its products are manufactured in Buffalo, sold in Buffalo and shipped from Buffalo to customers in California di-

rect by common carriers; that for purposes of economy at times some goods are bulked in transcontinental freight shipments to one point in said State and thereafter redistributed by public warehouse forwarders to points of their ultimate destination; that almost all orders for goods from customers are received at Buffalo by mail direct from customers themselves, are entered at Buffalo, credited and charged at Buffalo, filled at, and shipped from Buffalo, and collected for and paid for at Buffalo.

That Defendant has never transacted any business within the State of California other than the shipment of goods into said State in interstate commerce and the necessary details in connection with said shipments.

FRED D. MORGAN.

Subscribed and sworn to before me this 21st day of April, 1932.

C. B. McCOLLUM

Notary Public, Erie County, N. Y."

The hearing upon said Motion was duly set for the 9th day of May, 1932, and was thereafter from time to time continued to July 11, 1932.

That prior to the date of said hearing and on or about May 19, 1932, the plaintiff filed the following affidavits in defense of said Motion to vacate, set aside and quash pretended service of summons.



“AFFIDAVIT OF LENA G. SMUCKLER

STATE OF CALIFORNIA        )  
   ) SS  
 COUNTY OF LOS ANGELES )

LENA G. SMUCKLER, being duly sworn, deposes and says: That she is the plaintiff in the above entitled action: that the defendant, Liquid Veneer Corporation, maintains a stock of merchandise at the Haslett Warehouse Co., formerly Lawrence Warehouse Company, at the warehouse known as No. 19, located at 285 Brannan Street, San Francisco, California, and also at 37 Drum Street, San Francisco, California; that she has seen orders in the possession of said Lawrence Warehouse Company executed by the defendant herein, Liquid Veneer Corporation, ordering said warehouse company to ship merchandise out of the stock on hand to various concerns in the State of California; that E. C. Mack has called on your affiant enumerable times, as agent for the defendant herein, and has endeavored to adjust differences that have arisen between the parties hereto; that enumerable orders for the merchandise of the defendant herein ordered by concerns in Los Angeles, California, are ordered by the defendant herein to be filled from the above mentioned stock at San Francisco.

LENA G. SMUCKLER

Subscribed and sworn to before me this 17th day of May, 1932.

ELIJAH M. SMUCKLER. (SEAL)

Notary Public in and for said County and State.”





On said July 11, 1932, the date of said hearing, the defendant filed the following affidavits in further support of its Motion and in reply to the affidavits of said Lena G. Smuckler and Elijah M. Smuckler.

"AFFIDAVIT OF E. C. MACK

[illegible]

E. C. MACK, being first duly sworn, deposes and says:

That he is now and for some time has been a traveling salesman, his territory comprising the Pacific Coast area, which includes the *State* of Washington, Oregon, Nevada, Montana, Idaho and Northern California. That his duties are confined entirely to soliciting, within said territory, orders for the manufactured products of Liquid Veneer Corporation, of the City of Buffalo, State of New York, defendant above named, said orders being forwarded for acceptance by the said corporation at its Home Office in the City of Buffalo. That no sales are or have been made by affiant of any of defendant's goods, wares or merchandise within the State of California, affiant merely soliciting orders for defendants manufactured products, which orders, as aforesaid, are transmitted to defendants at its home office in the City of Buffalo for acceptance.

Affiant states that his compensation is based entirely upon commission on the orders obtained by affiant and accepted by defendant, as aforesaid.

Affiant further states that he has never been authorized to represent the said corporation in any other way or manner or to transact or conduct any business upon its part.

Deponent further states that he never called upon Lena G. Smuckler for the purpose of selling her any goods, wares or merchandise of the defendant corporation; that deponent has never had any conversations with Lena G. Smuckler in any representative capacity or under any authorization of the defendant corporation.

E. C. MACK

Subscribed and sworn to before me this 25th day of June, 1932.

C. R. DeLAP

County Clerk and Clerk of the County Court of Klamath  
County Oregon.

By PERRY O. DeLAP, Deputy.

(SEAL)"

# "AFFIDAVIT OF FRED D. MORGAN

STATE OF NEW YORK,     )  
  ) SS  
COUNTY OF ERIE,         )

FRED D. MORGAN, being first duly sworn, deposes and says:

That he is the General Manager of Liquid Veneer Corporation, the defendant above named.

That he has read the affidavit of Lena G. Smuckler, the plaintiff herein, filed in opposition to defendant's motion to quash the service of summons upon it. Affiant says that he has, and can have, no personal knowledge as to whether E. C. Mack ever called upon plaintiff as stated in her affidavit, but affiant states positively and of his own

knowledge that said E. C. Mack had no authority at any time to call upon plaintiff for the purpose of adjusting any differences that have arisen between plaintiff and defendant, Liquid Veneer Corporation. Affiant states that, other than this suit, he knows of no differences that have arisen between said parties.

Affiant further states that the said E. C. Mack has been employed by defendant as a traveling salesman, solely upon a commission basis, and solely and only for the purpose of soliciting orders within his territory, which includes the States of Washington, Oregon, Nevada, Montana, Idaho and Northern California, all orders being forwarded to the defendant for acceptance at its Home Office in the City of Buffalo, State of New York, and that the said E. C. Mack had no authority at any time to represent this defendant in any manner, or to transact any business for it or do anything in connection with defendant's business other than as herein stated, viz.: to solicit in his territory, hereinbefore described, orders for the manufactured products of defendant, said orders, as aforesaid, to be forwarded to the Home Office of defendant in Buffalo, New York, for acceptance by said defendant, and that upon any of said orders obtained by the said E. C. Mack being accepted by defendant, defendant filled same by shipment of the goods ordered, from its factory in Buffalo, New York, to the persons, firms or corporations giving the order, either directly to said person, firm or corporation, with bill of lading attached or in care of a warehouse to be delivered to the person, firm or corporation placing the order, upon payment of the invoice for such goods, freight and warehouse charges.

Further deponent saith not.

FRED D. MORGAN

Subscribed and sworn to before me this 20 day of June, 1932.

(SEAL)

C. B. McCOLLUM

Notary Public in and for the County of Erie, State of New York."

On July 11, 1932, said motion was taken under submission for decision by the Court, the parties to file Briefs.

On November 7, 1932, said Hon. Geo. Cosgrave made the following order, to-wit:

"MINUTE ORDER

Motion to quash granted. Exception to plaintiff.

November 7, 1932."

Upon motion made by plaintiff, supported by affidavit of her attorneys, and after notice of hearing thereon, the Court made an order, on December 12, 1932, vacating its ruling quashing the service of summons and granting leave to plaintiff to file Brief in ten days thereafter and granting defendant ten days thereafter to file Reply Brief.

On December 22, 1932, the plaintiff filed the original Summons issued by the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, at the time this action was filed in said Court, on the 17th day of December, 1931, and also filed attached thereto a Certificate of the Secretary of State of the State of California, reading as follows:

"STATE OF CALIFORNIA  
DEPARTMENT OF STATE.

STATE OF CALIFORNIA, )  
                                  ) SS  
DEPARTMENT OF STATE, )

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify.

That on the 1st day of March, 1932, duplicate copies of the Complaint and Summons, in the case of LENA G. SMUCKLER, vs LIQUID VENEER CORPORATION, were served upon me, as Secretary of State, which copies were accompanied by the fee of \$5.00 prescribed by Section 406a of the Civil Code of the State of California, and the statement required by said Section of the address of the defendant corporation, to-wit; Buffalo, New York, and also the address of the Pacific Coast Representative, E. C. Mack, 1890 Grove Stret, San Francisco, California.

I further certify that on the 2nd day of March, 1932, I advised the defendant corporation at the addresses above stated, by prepaid telegram, of the fact of the service upon me of duplicate copies of said Complaint and Summons, and that on said date I deposited in the United States Post Office, at Sacramento, California, a sealed envelop addressed, as above, with postage thereon fully prepaid, including postage for the transmission of said envelopes by registered mail, and that said envelopes each contained a copy of said Complaint and Summons.

I further certify that the records of this office do not contain the name of said defendant corporation, or show the location of its offices.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California, to be hereto affixed this 2nd day of March, 1932.

FRANK C. JORDAN, Secretary  
of State.

(Great Seal of                      By Robert V. Jordan,  
State of California)                      Assistant Secretary of  
State.”

While said Motion to Quash was under submission with the Court and on May 1, 1933, hearing was had on motion of plaintiff to re-open hearing on motion by defendant to quash service of Summons and to permit plaintiff to present testimony of Miss. E. Kaster, Mr. W. E. Max and Mr. E. C. Mack, and the Court orders said motion granted and sets the hearing for May 13, 1933.

On May 13, 1933, the following proceedings took place on the hearing to permit oral testimony on the part of plaintiff in opposition to defendant's motion to quash. Prior to the taking of any evidence the attorneys for defendant stated to the Court:

DIVET: If the Court please, the defendant appearing at this hearing continues to appear specially under the reservation of the special appearance that was made upon the original motion.

THE COURT: Yes.





# LIQUID VENEER CORPORATION

375 Ellicott Street Buffalo, New York

Household and Automotive Specialties

SHIP TO

THE MAY COMPANY, *copied*  
LOS ANGELES, CALIF. *7-16-32* WABASH & S E PREPAID-

TERMS-CASH, Less 2% in 10 Days-30 Days Net  
2% 10TH. PROX.

INVOICE TO JUL -7 1932

ORDER REC'D	DATE	DATE	SHIP	SALES	CLASS	DS
7/1/32	7/1/32	7/1/32	FROM	133834	16-	HOUSE
Quantity	DESCRIPTION	DEPT.	29	Per	Per	Per
DOZ. 4 OZ. LIQUID VENEER						
DOZ. 12 OZ. LIQUID VENEER						
DOZ. LV MOPS	DOZ. 101	DOZ. 102				
DOZ. LV MOPS	DOZ. 201	DOZ. 202				
DOZ. LV MOPS	DOZ. 301	DOZ. 302				
DOZ. CHAMPION SIZE	DOZ. OIL	DOZ. DRY				
DOZ. 2 1/2 OZ. TUBES RATINP						
DOZ. 4 OZ. TUBES NEVERLEAK TIRE FLUID						
DOZ. 8 OZ. CANS PURGO RADIATOR CLEANER						
DOZ. 9 OZ. CANS RADIATOR NEVERLEAK						
6 ONLY GALLONS- LIQUID DRY DIP						
6 ONLY HALF GALLONS-LIQUID DRY DIP						
1/2 GROSS DEPT. STORE SPECIALS- TO CONSIST OF-						
6 DOZ. 12 OZ. L. V.						
6 DOZ. # 302 MOPS-						
BALANCE OF ORDER SHIPPED FROM WAREHOUSE						
TOTAL OF THIS INVOICE						70.00

ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 30 DAYS FROM RECEIPT OF GOODS

## INVOICE

C20186

RECEIVED BY THE MAY COMPANY JUL 10 1932 375 ELICOTT STREET BUFFALO, N. Y.

DEPT. NO. **87179**  
INVOICE NO. **87179**  
DUE DATE **Aug 10**

INVOICE  
DATE **7-15**  
TOTAL **102.18**  
DUE DATE **Aug 10**

RECEIVING DEPT  
DATE **7-15**  
TOTAL **102.18**  
DUE DATE **Aug 10**

ORDER DIVISION  
DATE **7-15**  
TOTAL **102.18**  
DUE DATE **Aug 10**

CLAIM  
DATE **7-15**  
TOTAL **102.18**  
DUE DATE **Aug 10**

TRANS.  
DATE **7-15**  
TOTAL **102.18**  
DUE DATE **Aug 10**

RECEIVED BY THE MAY COMPANY JUL 10 1932 375 ELICOTT STREET BUFFALO, N. Y.

No. 5556-C  
SMUCKLER  
VS  
LIQUID VENEER  
Pltr Exhibit  
No. 21  
Filed May 9, 1935  
A. S. Zimmerman, Clerk  
By Cross  
Deputy Clerk

No. 5556-C  
SMUCKLER  
VS  
LIQUID VENEER  
Pltr Exhibit  
No. 1  
Filed May 13, 1935  
S. S. Zimmerman, Clerk  
By Cross  
Deputy Clerk



(Testimony of Robert H. Breckenridge)

ROBERT H. BRECKENRIDGE,

called as witness for the plaintiff, was being duly sworn. After stating his name counsel for the defendant objected to the testimony of the witness on the ground that he was not within the motion or the order reopening proceedings of the motion to quash and that said motion was made to present the testimony of witnesses, Miss E. Kaster, Mr. W. E. Max, and Mr. E. C. Mack. The Court overruled the objection and exception was taken. The witness then testified as follows:

I am the Assistant Controller for the May Company, located at Eighth and Broadway, Los Angeles. I am in charge of the records of both receivables and payables and have with me certain records of the May Company relating to transactions with the Liquid Veneer Corporation. These records are a part of the files of the May Company and under my control and management. This invoice of date of July 7, 1932, was mailed to us from the Liquid Veneer Corporation, of Buffalo, New York, and we received the merchandise billed on the invoice direct from Buffalo.

A photostatic copy of the invoice was admitted as plaintiff's Exhibit 1.

(Photostat.)

Subsequently I received an invoice as to the balance of the merchandise from Buffalo, New York, and received the balance of the merchandise from San Francisco. This invoice is dated July 18, 1932.

(Testimony of Robert H. Breckenridge)

A photostatic copy of said invoice was offered as evidence and the following objection was made by the defendant.

DIVET: I wish to interpose the objection that there was no proper foundation laid and that the document as offered and the recitals thereon are purely hearsay.

THE COURT: And the objection is overruled. Exception to the defendant.

The document was admitted as plaintiff's Exhibit 2.

**(Photostat)**

I hand you freight bill, dated July 15, 1932, under which we received the merchandise.

The document was admitted as plaintiff's Exhibit 3.

**(Photostat)**

I have here an invoice of the Liquid Veneer Corporation, dated April 13, 1932, received by mail from Buffalo, New York. All the merchandise invoiced thereon was received by us from Buffalo, New York.

Photostatic copy admitted as plaintiff's Exhibit 4.

**(Photostat)**

I have here an invoice dated April 18, 1932, which was mailed from Buffalo, New York. The merchandise we received from San Francisco.





SMUCKLER

Mo. 5598-C

VS  
LIQUID VENEER  
pitr Exhibit  
Mo. 8  
May 13, 1933  
R. S. Zimmerman, Clerk.  
By Cross  
Deputy Clerk



FREIGHT BILL  
1390 EAST 7TH ST., LOS ANGELES

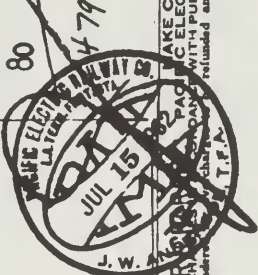
THE MAY CO

7/15/32 IRC 99 12063

To PACIFIC ELECTRIC RAILWAY COMPANY, Dr., for charges on articles transported:

WAYBILLED FROM  
SF 7/12/32 2155  
POINT OF ORIGIN OF SHIPMENT  
PSS ADM HALESTEAD 51  
FULL NAME OF SHIPPER  
LAWRENCE WHSE FOR LIQ VENEER CORP  
PREVIOUS WAYBILL REFERENCE  
ORIGINAL CAR INITIALS AND NO.

NUMBER OF PACKAGES, ARTICLES AND MARKS	WEIGHT	RATE	WEIGHT	ADVANCES	PREPAID
20 CTNS MOPS	204	63	133		
10 BOLS WOP HANDLES W/O ATTS	70	57	40		
2 BX FURNITURE POLISH IN GLS 85	125	80	100		
1 CTM 00	80	65	52	02 TOLLS	
4 CTN LIQ WAX					



TOTAL TO COLLECT

3 27  
3.77

LOCATION

MAKE CHECK PAYABLE TO  
PACIFIC ELECTRIC RAILWAY COMPANY  
WITH PURCHASED TARIFFS

SUBJECT TO STORAGE OR DEMURRAGE CHARGES  
The original paid freight bill must be surrendered for check.

131:10M

This Company appreciates suggestions from the public which may be helpful in improving the usefulness of the Company's organization to the public may be increased.  
Vice President & General Manager, Pacific Electric Building, Los Angeles, California.





1000  
Part. 1000

06807890-07545100-7617777 1 011.010 000 1,100,435 00000 0000019 7200100-0000. SALVADORA C.A., S.P. - GUATEMALA S. E.

Deputy Clerk

08A1700D .076+LCAV10--PATTHTB I 601.010 AND 1.720.093 DTG18Z PA181010 P181800-AM18. SALERONORVA LVA MILITARY DATA X







Mar 17

**Mauselhold and Automotive Specialties**  
372 Millard Street Buffalo, New York

NO. D800-4  
SANDOLIER  
V8  
LIQUID VEEVER  
Pier Zinhbit  
No. 8  
Filed Mar 12 1938

Sold to THE MAY COMPANY  
LOS ANGELES, CALIF

SHIP TO  
157

✓ N/A HASLETT WHSE- PACIFIC SS CO-  
FRT. PREPAID

**INVOICE DATE**

FEB 17 1943

TERMS—CASH, 30 Days Net • 5% CASH DISCOUNT

[illegible]

ORDER NO.	DATE	ENTRY	SHIP FROM	SHIP TO	DATE	CLASS
2-3-33	1936-6-33	189684-DEPT 29	SALES	10-M	CLASS	08
Quantity	DESCRIPTION	Net Per Doz.	1			
DOZ	1/2 OZ. LIQUID VENEER	No. 8568-C BUCKLER VS LIQUID VENEER				
DOZ	1/2 LIQUID VENEER	PLD Scotch R. B. Zimmerman, Clerk By Gross				
DOZ	1/2 OZ. TURP BATINIP					
DOZ	1/2 OZ. JAMES REVERE'S TURP FLUID					
DOZ	1/2 OZ. CANO PUROO RAYMOND CLEANER					
DOZ	1/2 CANO RADIATOR CLEANER					
20-1/3 DOZ	#101 MOPS	3.20	65.07			
8-3/4 DOZ	#202 MOPS	3.20	28.00			
38-1/8 DOZ.	#201 MOPS	4.80	150.00			
39 1/2 DOZ.	#202 MOPS	4.80	189.60			
8 DOZ.	#206 MOPS	4.80	38.40			

**TOTAL OF THIS INVOICE**

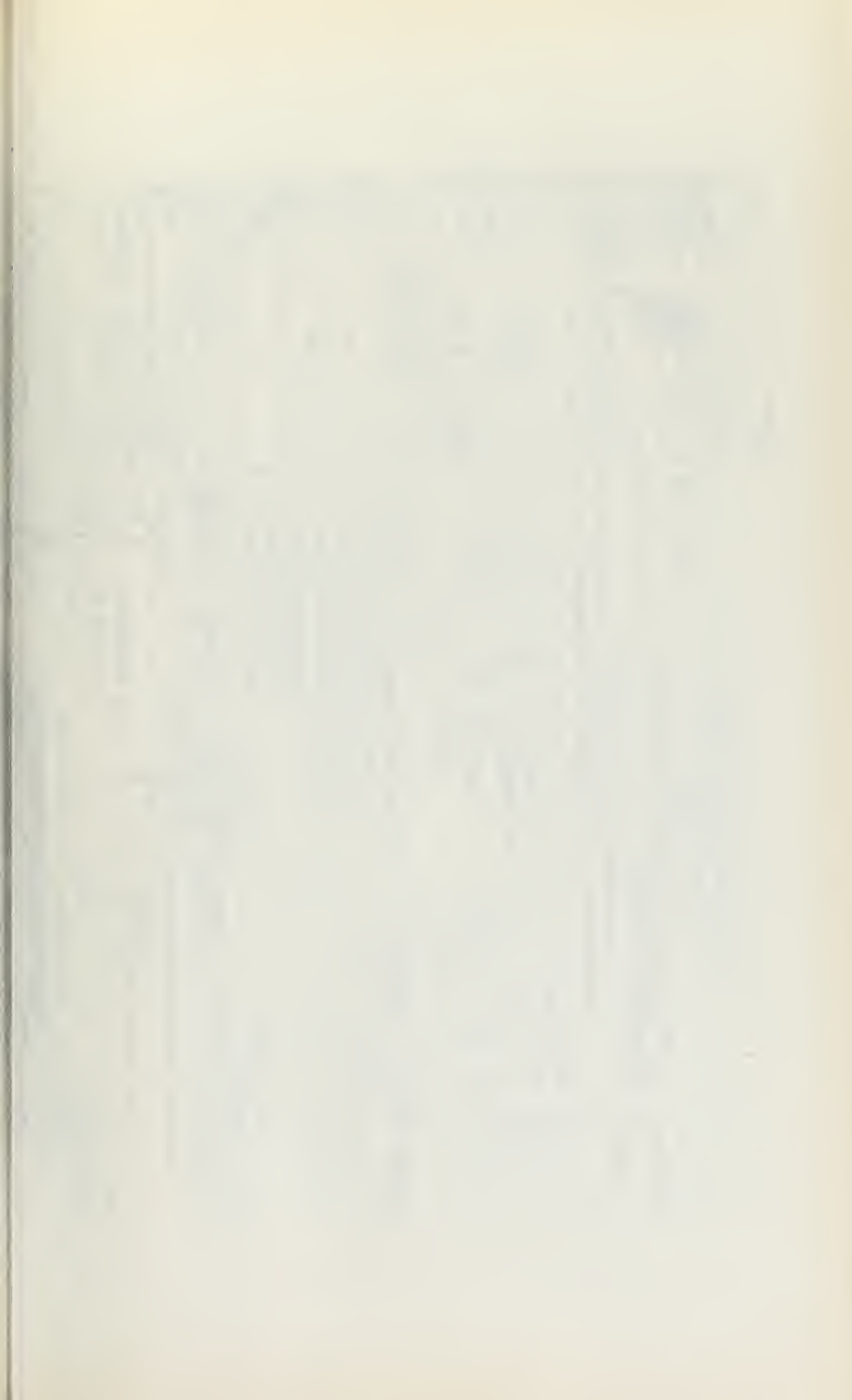
卷之五

D 1220

# INVOICE

**ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 90 DAYS FROM RECEIPT OF GOODS**

0007180000/THOMAS MILES LIMITED P.O. BOX 600, 40, BULLY ROAD CO., LTD., SUDBURY HILLS, N.Y.



## Illustrated and Audiovisual Spectacles

Palto, New York

No. 5559-C  
SMUCKLER  
VS  
LI-UID VANEER  
Plf Exhibit  
No. 27  
Filed May 9, 1935  
R. S. Zimmerman, Clerk  
By Cross

**SHIP TO**

**~~FRT~~ PREPAID**

**INVOICE DATE**

FEB 16 1935

~~TERMS-CASH,-30 Days Net -2% 10TH PROX~~

29	92/48	Box 29
	maio	

QTY	ITEMS	DATE	BY	FOR	NO.
29-33	BATT	8-10-33	Lt	Pack	1
					192936 DEPT 29
					NAT 10-HOUSE
					C-88
Quantity	DESCRIPTION	Net Per Desc.	T	J	
DOZ	4 OZ. LIQUID VENEER				
' DOZ	12 OZ. LIQUID VENEER				
DOZ	3 1/2 OZ. TUBES BATHTIP				
DOZ	4 OZ. TUBES REVELLAK TILE FLUID				
DOZ	8 OZ. CAN PUCCO RADIATOR CLEANER				
DOZ	9 OZ. CANS RADIATOR REVELLAK				
1 GROSS	L.V. DEPARTMENT STORE SPECIAL	● PER GROSS			
		122.40			
		122.40			

MAR 7 1933

No. 5559-C  
BRUCKLER  
VS  
LIQUID VENEER  
PLST Exhibit  
Dated MAY 13, 1933  
at S. Zimmerman, Clerk  
By Gross  
Deputy Clerk

PAYED

FEB 24 1933

SHIPPED FROM OUR WAREHOUSE AT SAN FRANCISCO, CALIF



This Company is always open to suggestions from the public which may be helpful in improving the service. The management is particularly interested in reports of unsatisfactory and courteous treatment received at the hands of our employees so that by commending such acts the usefulness of the Company's organization to the public may be increased.

Vice President & General Manager, Pacific Electric Building, Los Angeles, California.

1-31-100M



NO. 5586-C  
SMUCKLER  
VS  
LIQUID VENEER  
PILF Exhibit  
No. 6  
Filed May 8, 1935  
R. S. Zimmerman, Clerk  
By Cross  
Deputy Clerk

THE MAY CO

1200 EAST 7TH ST., LOS ANGELES

FREIGHT BILL

R. S. Zimmerman Clerk

NO. 5586-C  
SMUCKLER  
VS  
LIQUID VENEER  
PILF Exhibit  
No. 6  
Filed May 10, 1935  
By Cross  
Deputy Clerk

4/18/32 PRESENT BILL NO.

59 7443

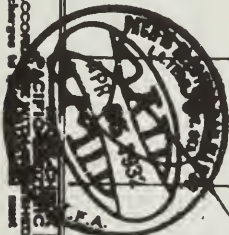
TO PACIFIC ELECTRIC RAILWAY COMPANY, Dr., for charges on articles transported:

WJS

WAVELED FROM  
S F CALIF  
4/15/32  
1290 LAWRENCE WISE CO A/C LIQD VENEER  
FULL NAME OF SHIPPER  
PREVIOUS WAYBILL REFERENCE  
DATE OF SHIPMENT  
PREVIOUS WAYBILL REFERENCE  
DATE OF SHIPMENT

NUMBER OF PACKAGES, ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCE	TOTAL
2 BX LIQ MAX FLOOR IN TIN 58	88	65	57		
3 CTN DO DO 30	27	52	14		
3 BOLS MOP HANDLES LESS AIT					
6 CTN 110PS		65	59		
26-53160					
76910					
01 Tolls					
RICHARDS S/S					
TOTAL TO COLLECT					

LOCATION  
SUBJECT TO STORAGE OR DEMURRAGE CHARGES IN ACCORDANCE WITH THE TARIFFS  
The original paid freight bill must be surrendered for credit of the freight bill.



APR 27 1932

50 719





**Buffalo, New York**

## **Innenschold and Automotive Specialties**

No. 5658-C  
 SANDTLER  
 VS  
 LIND VEEBEN  
 Pltr Exhibit  
 No. 5  
 filed May 13, 1935  
 R. G. Zimmerman, Clerk  
 By Cross

THE MAY CO.  
LOS ANGELES, CALIF.

137  
VIA P S S CO- PREPAID

**INVOICE DATE**

**TERMS—CASH, Less 2% in 10 Days—30 Days Net**

BUYER		CLARK		ORDER DIVISION		RECEIVING DEPT.		INVOICE OFFICE	
NAME	1437416	NAME	5770	TO ORDER	2	DATE	12/20/22	DATE	5/31/60
ADDRESS	1437416	ADDRESS	1155	QUANTITY	2	QUANTITY	1416	QUANTITY	1416
CITY	1437416	CITY	1155	PRICE	1437416	PRICE	1437416	PRICE	1437416
STATE	1437416	STATE	1437416	TOTAL	1437416	TOTAL	1437416	TOTAL	1437416
COUNTRY	1437416	COUNTRY	1437416	REMARKS	1437416	REMARKS	1437416	REMARKS	1437416
DATE	1437416	DATE	1437416	DATE	1437416	DATE	1437416	DATE	1437416
TIME	1437416	TIME	1437416	TIME	1437416	TIME	1437416	TIME	1437416
BY	1437416	BY	1437416	BY	1437416	BY	1437416	BY	1437416
FOR	1437416	FOR	1437416	FOR	1437416	FOR	1437416	FOR	1437416
BY	1437416	BY	1437416	BY	1437416	BY	1437416	BY	1437416
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FOR	1437416	FOR	1437416	FOR	1437416	FOR	1437416	FOR	1437416
BY	1437416	BY	1437416	BY	1437416	BY	1437416	BY	1437416
FOR	1437416	FOR	1437416	FOR	1437416	FOR	1437416	FOR	1437416
BY	1437416	BY	1437416	BY	1437416	BY			

ORDER REC'D	DATE	ENTERED	SHIP W	ENTERED	DATE	CLASS
Q-NO	DATE	BY	FROM	DATE	MAN	OS
41152	08/11/52	9		1222622	16-M	
Q-NO	DATE	BY	FROM	DATE	MAN	OS
DOZ	4 OZ. LIQUID VENEER					
DOZ	12 OZ. LIQUID VENEER					
DOZ	LV MOPS	DOZ 101	DOZ 102			
DOZ	LV MOPS	DOZ 201	DOZ 202			
DOZ	LV MOPS	DOZ 301	DOZ 302			
DOZ	CHAMPION SIZE	DOZ. OIL	DOZ. DRY	DOZ. DUSTERS		
DOZ	2 1/2 OZ. TUBES RATINIP					
DOZ	4 OZ. TUBES NEVEYLEAK TIRE FLUID					
DOZ	8 OZ. CANS PURCO RADIATOR CLEANER					
DOZ	9 OZ. CANS RADIATOR NEVEYLEAK					
6 DOZ	12 OZ. LV LIQUID WAX	@ PER DOZEN				
2 DOZ	32 OZ. LV LIQUID WAX	@ PER DOZEN				
3 DOZ	LV CHAMPION MOPS - DRY	@ PER DOZEN				
SHIPPED FROM WAREHOUSE AT SAN FRANCISCO, CALIF.				Ref-Pw-Dom.	TO	

C16430

# INVOICE

**TOTAL OF THIS INVOICE**

79.36



(Testimony of Robert H. Breckenridge)

Photostatic copy of invoice admitted as plaintiff's Exhibit 5.

**(Photostat)**

I have here freight bill dated April 15, 1932, covering this merchandise.

Admitted as plaintiff's Exhibit 6.

**(Photostat)**

I have here invoice dated February 16, 1933, received from Buffalo, New York. The merchandise was received from San Francisco.

Admitted as plaintiff's Exhibit 7.

**(Photostat)**

I have here invoice dated February 17, 1933, received from Buffalo, New York. The merchandise described therein was received from San Francisco.

Photostatic copy admitted as plaintiff's Exhibit 8.

**(Photostat)**

To sum it up all of the invoices were received from Buffalo, New York, and some of the goods filling the invoices were received from Buffalo and some from San Francisco.

(Testimony of Karl S. Nance)

I made no search of our records in back of the dates of these documents and do not know whether there are any similar invoices older than the oldest date of these invoices. May Company has been dealing with the Liquid Veneer Corporation for a matter of about 5 or 8 years. There has been no change in the general method of transacting business with Liquid Veneer Corporation on the part of the May Company.

KARL S. NANCE,

called as witness on behalf of plaintiff was duly sworn and before he testified objection was made by defendant to his testimony on the ground that he was not one of the witnesses named in the motion for order re-opening proceedings to quash. The objection was overruled and witness testified as follows:

I am assistant in the Auditing Department of Young's Market Company, located in Los Angeles, and I have with me two invoices from the files of the Company from the Liquid Veneer Corporation. This invoice dated April 30, 1930, was received from the Liquid Veneer Corporation, at Buffalo, New York. The merchandise described therein was received from the warehouse at San Francisco, on May 1, 1930.

Photostatic copy of invoice and record of date of receipt of merchandise was admitted as plaintiff's Exhibit 9.

(Photostat)

Deputy Clerk Deputy Clerk

Deputy Clerk

# INVOICE







FREIGHT BILL  
1380 EAST 7TH ST., LOS ANGELES  
YOUNGS MKT CO 1610 W 7TH ST

3/17/31 Bill No. SS 16153

TO PACIFIC ELECTRIC RAILWAY COMPANY, Dr. for charges on articles transported:

WAYBILL FROM

WAYBILL DATE AND NO.

FULL NAME OF SHIPPER

CAR INITIALS AND NO.

SE 3/14/31 2303

LAURENCE WISE FOR LIQ VENEER CORPN

PREVIOUS WAYBILL REFERENCES

ORIGINAL CAR INITIALS AND NO.

NUMBER OF PACKAGES, ARTICLES AND MARKS

WEIGHT

RATE

FREIGHT

ADVANCES

PREPAID

1 CRT LIQ VENEER IN BXS IN GLS  
6 CTNS DITTO  
2 CS DITTO IN GLS

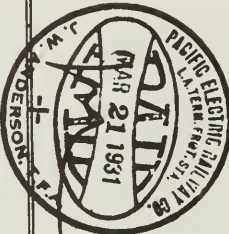
135  
82  
104

80

2 57

01 TOLL

OK  
For Payment  
4/1/31



LOCATION ~~REPORT STORAGE~~ DEMURRAGE CHARGES IN ACCORDANCE WITH PUBLISHED TARIFFS. MAKE CHECK PAYABLE TO PACIFIC ELECTRIC RY. CO. FOR TOTAL TO COLLECT \$ 58.

No. 5558-C

SMUCKLER

VS LIQUID VENEER

Pit Exhibit

No. 13

Filed May 2, 1935

R. S. Zimmerman, Clerk

By Cross

Deputy Clerk

No. 5558-C

SMUCKLER

VS LIQUID VENEER

Pit Exhibit

No. 12

Filed May 13, 1935

R. S. Zimmerman, Clerk

By Cross

Deputy Clerk

This Company appreciates suggestions from the public which may be helpful in improving the service. The management welcomes, in particular, reports of unusually satisfactory and courteous treatment received at the hands of our employees so that by commending such acts the usefulness of the Company's organization to the public may be increased.

Vice President & General Manager Pacific Electric Building, Los Angeles, California.





The Company aims to serve the public pleasantly and well. Officers and employees are working together in this, and the failure of one is a reflection upon all. Our customers will render a service by calling attention to delinquency. Address General Superintendent, Pacific Electric Building, Los Angeles, California.  
The original paid freight bill must be surrendered for overcharges. No refund must accompany claims for overcharge, loss, or damage.



FREIGHT BILL  
1300 EAST 7TH ST., LOS ANGELES

FREIGHT  
BILL NO.

YOUNGS LMT CO

1610 W 7TH STREET

5/1/30 VEVL

35 37934

TO PACIFIC ELECTRIC RAILWAY COMPANY, Dr., for charges on articles transported:

WAYBILLED FROM

WAYBILL DATE AND NO.

PULL NAME OF SHIPPER

CAR STATUS AND NO.

SHIPMENT AND DATE OF SHIPMENT  
PSS SERREF 189

4/28/30 4602 LAY WISE CO FOR LQ VENEER CO

NUMBER OF PACKAGES, ARTICLES AND MARKS

WEIGHT

RATE

FREIGHT

ADVANCES

TOTAL

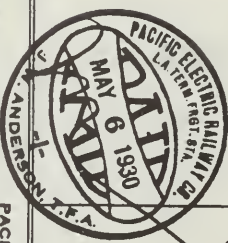
2 CTNS LIQ VENEER  
1 CS DDO  
1 CRT DO

124  
135  
52

80

2 49

01 TOLLS



LOCATION

MAKE CHECK PAYABLE TO  
PACIFIC ELECTRIC RY. CO. FOR

TOTAL TO COLLECT

BEECHING'S STYS

OR DEMURRAGE CHARGES IN ACCORDANCE WITH PUBLISHED TARIFFS.

2 50

No. 5558-C  
SMUCKLER  
VS  
LIQUID VENEER  
Pltf Exhibit  
No. 11  
Filed May 9, 1935  
R.S. Zimmerman Clerk  
By Cross  
Deputy Clerk

No 5558-C  
SMUCKLER  
VS  
LIQUID VENEER  
Pltf Exhibit  
No. 11  
Filed May 13, 1935  
R.S. Zimmerman, Clerk  
By Cross  
Deputy Clerk



Young's Market Co., Inc.

Date 3/17/31 1931

Name Liquid Veneer Co.

Address

Apt. No.

8 Cts 12 1/2 oz Liquid Veneer

4 Cts 12 1/2 oz "

2 Cts 12 1/2 oz "

Memo

1017  
1017

No. 5555-C  
Liquid Veneer  
Pltr Exhibit  
Filed May 18, 1935  
R. S. Zimmerman, Clerk  
By Cross Deputy Clerk

No. 5555-C  
Liquid Veneer  
Pltr Exhibit  
Filed May 18, 1935  
R. S. Zimmerman, Clerk  
By Cross Deputy Clerk

Form 100

375-377 ELlicott STREET

# LIQUID VENEER CORPORATION

BUFFALO, N. Y.

C1690

MAR 20 1931

DATE

B48875

SOLD

TO:

YOUNG'S MARKET CO.  
1620 WEST SEVENTH ST.  
LOS ANGELES, CALIF.

137

SHIPPED TO:

VIA:

P S S CO- FRT. ALLOWED

30 DAYS NET ~~25~~ 10 DAYS

DATE SOLD	ORDER ENTERED	CUSTOMER'S ORDER	SALESMAN	CLASS	TERMS
3/7/31	3/12/31	4354	2M	C8	

QUANTITY	DESCRIPTION	PRICE	EXTENSION	TOTAL
✓ 4	DOZEN 4 OZ. LIQUID VENEER	@ PER DOZEN 1.92	7.68	
✓ 8	DOZEN 12 OZ. LIQUID VENEER	@ PER DOZEN 3.84	30.72	
✓ 2	DOZEN QUARTS LIQUID VENEER	@ PER DOZEN 8.00	16.00	

54.40  
109  
53.31

SHIPPED FROM WAREHOUSE AT SAN FRANCISCO, CALIF. MAR 14 1931

**2 PER CENT DISCOUNT IF PAID BY**  
MAR 30 1931

HOUSEHOLD DEPARTMENT

**PAID**  
MAR 20 1931

Young's Market Co. Inc.

No. 29527

The 2% we give you for paying cash 20 days before this bill is due amounts to a return of 36% on the money you loaned to clean up this account. Don't lose your discount!

INVOICE

(Testimony of Karl S. Nance)

This invoice dated March 20, 1931, was received from Liquid Veneer Corporation, in Buffalo, New York, and the merchandise was shipped from the warehouse in San Francisco, and received here on March 17, 1931.

Photostatic copy of invoice and record of receipt of merchandise was admitted as plaintiff's Exhibit 10.

**(Photostat)**

This photostatic copy of a freight bill dated May 1, 1930, is a copy of the freight bill we received at the time we received the shipment under the 1930 order.

Photostatic copy of freight bill admitted as plaintiff's Exhibit 11.

**(Photostat)**

This photostatic copy of freight bill, dated March 14, 1931, covers the merchandise received on our invoice on the 1931 order.

Photostatic copy of freight bill, dated March 14, 1931, admitted as plaintiff's Exhibit 12.

**(Photostat)**

On cross-examination he testified as follows:

All I know about the shipment of this merchandise from a warehouse in San Francisco is what I learned from an examination of the freight bills and other documents. I do not know whether there was a warehouse there at the time the merchandise was shipped.

(Testimony of Miss Emma M. Kaster)

MISS EMMA M. KASTER

called as witness for plaintiff was sworn and testified as follows:

I am a demonstrator and saleslady employed by the Liquid Veneer Corporation, of Buffalo, New York, at the May Company. I demonstrate and sell Liquid Veneer merchandise and May Company merchandise, and derive my compensation solely from the Liquid Veneer Corporation. It is in the form of a check sent through the mail to my home. I work under the supervision of Mr. Max, buyer for The May Company, and Mr. Gallivan, of the Liquid Veneer Corporation, who is in Buffalo, New York. I know E. C. Mack, an employee of Liquid Veneer Corporation, as he hired me. I do not know his address. All I know is that he is connected with the Liquid Veneer, I believe as District Manager. When he comes into the store I have no conversation with him with respect to my duties as demonstrator. Our talk is along a business line of, "How is business?" "Selling much?" Just ordinary business conversation takes place. I do not know that he has his headquarters in San Francisco. That is his home. I am paid a straight salary, and commissions if I sell a certain amount, but I have not been selling that much so I do not get any commissions. When we run short of merchandise at the May Company I go to Mr. Max and ask him for an order and the girls in the office write it up. Goods are received as I need it. I do not know where it comes from. I have been at the May Company for 12 years. I first started working for the Liquid Veneer Corporation 7 or 8 years ago. Its products handled in the May Company are dust mops, furniture polish, liquid wax, fly spray and moth spray, general household merchandise.

(Testimony of Miss Emma M. Kaster)

On

### CROSS-EXAMINATION

she testified:

As demonstrator I show a customer merchandise and explain it to her, try to sell it to her and show her other merchandise if there is anything she is interested in buying and showing how it is used. For that I am paid by the Liquid Veneer Corporation. The merchandise that I sell is May Company merchandise. I do not confine my sales of May Company merchandise to Liquid Veneer Corporation products but sell other merchandise as well from its stock of goods. I do not know from where the products are purchased but assume from the Company producing it. So far as I know Liquid Veneer products are sold to the May Company just as any other property in the store is sold. Though I sell products of the May Company it doesn't pay me for these sales as that is the policy amongst demonstrators. I am merely a representative of the Liquid Veneer Corporation. We are to help out the customer and show her their merchandise so we can sell our merchandise. There are about twenty of us demonstrators showing different lines. The idea consists of showing customers how to use these products and to try to interest them so as to sell our merchandise with the merchandise of the May Company. I do not work under Mr. Mack and receive no orders from him. I give him whatever information I can when he asks me for it. The goods I sell are out of the May Company stock of goods. Mr. Max is the buyer for the May Company while Mr. Mack is the representative of the Liquid Veneer Corporation, and lives in San Francisco.



(Testimony of Mrs. Lena G. Smuckler)

MRS. LENA G. SMUCKLER

was called for witness, was sworn, and after stating her name the defendant objected to the taking of her testimony on the ground that her affidavit was already on file and that she is not among the witnesses for whose testimony the hearing was opened up. The objection was overruled and she testified as follows:

I manufacture French Veneer Polish. In the year 1932 I had occasion to go to a warehouse in San Francisco, the Lawrence Warehouse, down by the water front. I do not quite remember the address. I do not remember the date I was there. It was in the early part of 1932. I would judge it was the latter part of January or the early part of February. There I saw merchandise marked with the name "Liquid Veneer" and bills there were made out to concerns that they were shipping out to in California. I had been a demonstrator in the May Company and the carton in which the merchandise of the Liquid Veneer Corporation is brought up to the demonstrating floor was similar in character to the cartons I saw in the warehouse. I had a conversation with the bookkeeper at the warehouse.

Defendant objected to the conversation as being "immaterial, incompetent and purely hearsay." Colloquy between respective counsel and the Court took place, counsel for defendant stating:

MR. DIVET: This bookkeeper in the one or the other of these warehouses may be possessed of very important and material information, but in order that that important and material information may be gotten over to this Court, this man must be put upon oath; it cannot be



(Testimony of Mrs. Lena G. Smuckler)

gotten over by someone telling what that man told her. This witness testified that she talked with this bookkeeper and counsel is asking her to detail what that man told her. If that is not within the hearsay rule, then I do not understand the rule.

THE COURT: That may be true, but it reasonably appears in the case that the merchandise was shipped from a place in San Francisco, and it appears also that it came from this place that is being described by the witness. The witness states that the bills were sent out from this place and that the company's product was there. If the company's product was in charge of somebody there I would assume that was with the company's permission. That would be a fair assumption, of course. We are not trying the case, of course. We are merely trying to get at, as a preliminary hearing, just what the capacity of the company is in California, what the company is doing in California. I think the evidence may safely be admitted. Overruled.

THE WITNESS TESTIFIED: I asked him if they kept Liquid Veneer there and he said they did; and I asked him "could customers come there and purchase Liquid Veneer and have it shipped to them?", and he said "Yes, they can." He said, "They have agents here to take orders and ship it direct from this warehouse.", and "Mr. Mack, himself, brought all his orders to have them shipped." I asked him, "Could I purchase Liquid

(Testimony of Mrs. Lena G. Smuckler)

Veneer from you here and have it shipped to my address?"

He said, "You certainly can."

MR. DIVET: I move to strike out that testimony upon the ground it now appears to be purely and entirely hearsay, a recital of statements from one on which no foundation is laid.

THE COURT: That remains to be found out. I will reserve ruling on that point. Proceed.

There was no further examination by counsel. Upon

#### EXAMINATION

by the Court she testified:

I was in the warehouse perhaps an hour—and saw a big room full of Liquid Veneer. I did not go through the whole warehouse. He took me into this door and in back of this place was all Liquid Veneer. The room was not as large as the size of this court room, it was smaller, although it was a great big room. It was about one-half the size of this court room and all filled with Liquid Veneer. It was packed in boxes, paper cartons marked "Liquid Veneer." It had more floors but I only went into this particular place. I was only in this one room. I just wanted to see if they had merchandise there, that was all I wanted.

Q: You described the position of this man's desk?

A: Yes.

Q: Where was it?

(Testimony of Mrs. Lena G. Smuckler)

A: Well, it was similar to this. You come up two or three steps, and then you come in there, a sort of cage—you know how they have cages, sort of wire, and then there is an opening, and I spoke to him through this, and right up here (indicating) was a door that led back into this place.

Q: Into the room that you have described?

A: Yes. When I was talking to him he showed how they made out their bills, what their bills was, and told me what quantities I could buy. I talked as if I wanted to buy merchandise from him.

Q: He showed you bills?

A. Yes, of the Liquid Veneer people, the way they make them out to their customers.

Q: Well, did you see any purchases made there?

A: At the time I was there?

Q: Yes.

A: No, I did not. I did not see anybody in there buying at the time. All I saw was that he was making out bills to ship out.

Q: What else did this man do?

A: That was all that he was doing. You see he was sort of a bookkeeper and shipping clerk combined.

Q: Did he ship for anybody other than the Liquid Veneer?

A: Well, I don't know, because I did not ask him. You see, I was not interested in anybody else.

(Testimony of Mrs. Lena G. Smuckler)

On

### CROSS-EXAMINATION

the WITNESS TESTIFIED:

"I did not learn the name of the man. - - - I asked him if I could purchase some Liquid Veneer in there and he wanted to know who I was and I told him I was a party who wanted to go into business and wanted to know whether I could purchase from Liquid Veneer Corporation so I could keep it on hand and I asked him how they made out their bills - - - and he brought out some bills that were all typed out and were going out with the merchandise." I did not ask him his name at that time although I was there for the purpose of getting information with regards to this case.

Q: Yet you did not take pains enough to inquire what the man's name was that was giving you this valuable information?

A: Well, I did ask him if he was just a new man or if he had been there a long time. He said he had been there a long time. Coming in as I did I did not feel I wanted to ask too many questions or let him know who I was. I don't believe I can describe the kind of looking man he was. He wasn't real young, I would say about in his late thirties. I do not remember whether or not he wore glasses. He was smaller than the gentleman sitting here but I don't know if he was quite as tall. This little wicket that he was back of was located right next to this room that had the Liquid Veneer in it. There was a door opening from the right near his wicket into the room where the Liquid Veneer stock was kept. My best recollection of the time is not that it was in January or

(Testimony of Mrs. Lena G. Smuckler)

February 1931 or 1932, - - - it was either in 1930 or 1931. I just don't remember. I could look it up, I didn't think to look it up.

Q: 1930 or 1931?

A: Yes. I *caon't* tell you - - I couldn't say to that. I wouldn't want to say because I just don't remember.

Q: You were at that time engaged in gathering information as to whether they were doing business in California or not?

A: Yes, sir.

Q: Well, the question of their doing business in California had not arisen at that time, had it?

A: Yes, sir.

Q: Your action was not brought until March 1932, was it?

A: Well, I was gathering information for it, however, because they had been bothering my sales; they had been bothering my customers, my sales.

I was not anticipating that the defendant would say it was not doing business in the State. I was not anticipating anything. When I would put on a demonstration they would write threatening letters to my customers and have me put out of business because they said I was using the word "Veneer". This had been going on for many years. In 1930 or 1931 they claimed they were not doing business here. I have given you as good a description of the man as I can. I did not find out who the man was, so I don't know his name.

The hearing was thereupon continued to May 29, 1933, at which time the defendant filed the following affidavits.

“AFFIDAVIT OF THOMAS B. HEALY

UNITED STATES OF AMERICA, )  
 STATE OF NEW YORK, ( SS  
 COUNTY OF ERIE, (

THOMAS B. HEALY, being duly sworn, deposes and says that he is an officer of the Liquid Veneer Corporation, the defendant above named, and is familiar with the methods used by said corporation in the shipment of its merchandise to various parts of the United States and that deponent is also familiar with the freight rates in connection with said shipments whether by rail or water; that it is part of deponent's duties to figure freight costs and charges on merchandise shipped in interstate business by defendant above named and to devise and select the most economical forms of transportation.

That in shipping merchandise from Buffalo, New York, to the West Coast of the United States it is at times necessary for purposes of economy to ship said merchandise in car load lots, have same deposited at a central point such as a public warehouse in San Francisco and then have said shipments broken up and reshipped and redistributed to plaintiff's customers at various points on the West Coast; that said merchandise so shipped is always in transit.

That if merchandise is shipped by freight overland across the United States in less than car load lots the freight rate is \$3.45 per hundred pounds; that if said merchandise is shipped in full car load lots by rail from Buffalo to New York City and then by boat to San Fran-

cisco the combined freight rate both by rail and water amounts to \$1.15 per hundred pounds and a saving of \$2.30 per said one hundred pounds. As an example of the economy effected by said methods the last car load shipment of customers orders sent by defendant to the West Coast weighed approximately thirty-six thousand pounds and a saving to defendant above named of \$828.00 when shipped by rail and water as against the cost if same had been shipped in less than car load lots overland to the West Coast of the United States. The methods used by defendant above named in shipping merchandise on long hauls is to ship it in car load lots, route it to a central point such as a public warehouse in San Francisco for redistribution to customers and then have the shipment broken up and redistributed; that this is the only practical method to insure both economy and service and is the usual and most economical method employed by all business houses engaged in interstate commerce.

When a customer's order is reshipped and redistributed from a public warehouse to a customer it is ordinarily freight billed from the warehouse. The above method is used by defendant above named in the reshipment of its merchandise and is the common and ordinary practice in interstate commerce.

Deponent has read the substance of that part of Mrs. Smuckler's oral testimony in which she states she saw merchandise of the defendant in a warehouse in San Francisco. Deponent states on his own knowledge and experience that said testimony is untrue in that no person would be permitted without authority from the shipper and on proper identification to have access to a shipper's goods or to inspect same in any public warehouse in California or anywhere else. Deponent further states that



defendant above named never carried a permanent warehouse stock in California, never employed any person in any warehouse in charge of its merchandise and never had any employee at any warehouse authorized to receive or accept orders. That all of the business of defendant is transacted from the City of Buffalo, New York.

(Signed) THOMAS B. HEALY

Subscribed and sworn to before me this 26th day of May 1933.

C. B. McCOLLUM

Notary Public, Erie County, N. Y."

# "AFFIDAVIT OF MARTIN J. CABANA

STATE OF NEW YORK )  
COUNTY OF ERIE ) SS

MARTIN J. CABANA, being duly sworn, deposes and says: That he is the Vice-President in charge of sales of the Liquid Veneer Corporation, Defendant above named, and has been connected with said business for upwards of thirty years.

That deponent has read the substance of the oral testimony given by Lena G. Smuckler, the plaintiff herein, on the hearing of the motion to quash the service of the summons served on the defendant by mail in this action; that said Lena G. Smuckler stated in said testimony that in 1930 or 1931 she visited a warehouse in San Francisco and found there a room which was practically full of Liquid Veneer Corporation's products, that same were packed in cartons the same as those she had seen in the May Company in Los Angeles; that there was an unidentified man

in said warehouse who professed to be in charge of the Liquid Veneer Corporation's business and that she asked said man if Liquid Veneer Corporation would ship goods from San Francisco to her at Los Angeles and that the said unidentified man assured her that a stock of goods was kept on hand at San Francisco and that orders could be filled from there by mail and that the goods would be delivered direct to customers.

Deponent states on his own knowledge that said testimony of Lena G. Smuckler, the plaintiff herein, is not true in that Liquid Veneer Corporation has never at any time employed a man in San Francisco or any place else in the State of California in charge of its business or its merchandise; that defendant's method of doing business is, and was at all times herein mentioned, to ship and bill all orders for merchandise to customers in California direct from Buffalo; that all orders for merchandise from customers in California had to be received, approved of and paid for in Buffalo; that occasionally for the purposes of saving freight rates a car load shipment of merchandise would be sent to a central point in California such as a warehouse in the City of San Francisco for redistribution from said point to various customers in different parts of California and in sending an order for goods part of said order might be reshipped by freight from said warehouse to its ultimate destination; that at no time did defendant above named ever carry a permanent stock of goods in any warehouse in the State of California nor did defendant ever have any representative or employee in charge of any stock in any warehouse; that defendant has never owned any property in the State of California, has never been licensed to do business in said State and has never had any employees in said State excepting a

demonstrator and a traveling salesman on a commission basis; that defendant has never had any one in said State designated to receive legal process, has never had any one present at any warehouse in the State of California representing the Company and clothed with any authority to do such things as the plaintiff herein has testified were done by the unidentified person to whom she referred.

That the May Company and Youngs Market in the City of Los Angeles have been customers of the defendant with an established line of credit; that when said customers ordered merchandise from defendant same would be shipped direct from Buffalo and occasionally the whole or part of the order might be filled by routing merchandise through a public warehouse in order to economize on freight charges from Buffalo; that it is more economical to send a car load lot of goods to a warehouse in California from the City of Buffalo and have same redistributed from said point to customers in California than it is to ship each order individually direct from Buffalo to customers in California as the frequent shipment of small orders is expensive on long hauls and therefore over a long period of time it would happen occasionally that part of an order might be shipped to a customer from a warehouse out of a car load lot of goods but only in the way of redistribution from a central point; that at no time were any goods of defendant ever shipped initially from any point other than from the City of Buffalo nor ordered or paid for by customers to any other point than said City; that all orders have to come to Buffalo and all shipments be made from Buffalo excepting that occasionally as aforesaid a car load lot of merchandise might be routed through a warehouse by the defendant in order to save on freight rates; that at no time could a customer

in California order goods otherwise than through the home office of the Company at the City of Buffalo.

That outside of its home State of New York defendant does a strictly interstate commerce business in the United States of America and as a general business policy has no branches, agents, stocks of goods or property of any kind, real or personal, in any State of the Union other than the State of New York; that all its business is carried on at Buffalo, New York, all orders filled, approved of and paid for at said City and all goods shipped from its factory in Buffalo direct to customers and not otherwise excepting as aforesaid.

(Signed) MARTIN J. CABANA

Subscribed and sworn to before me this 25th day of May 1933.

(Seal of Notary)

THOMAS B. HEALY"

On October 7th, 1933 the Court made the following order:

#### "MINUTE ORDER

COSGRAVE, District Judge.

The oral evidence taken is sufficient, being uncontradicted, to show that the defendant was doing business in California.

Motion to quash is denied with right to defendant to renew the same at the trial. Exception to defendant.

October 7, 1933."

On May 7, 1935, the date of the trial, after the jury was impaneled and sworn and retired from the Court room, before an opening statement or any evidence, the defendant renewed its motion to quash the service of the summons on the ground that the Court had no jurisdiction of the defendant, and filed the following renewed motion and affidavits.

"Comes now the defendant, Liquid Veneer Corporation, appearing specially for the purpose of this motion only, and without in any manner submitting itself to the jurisdiction of the above entitled court, over the person of the defendant, but questioning and denying such jurisdiction, and pursuant to the Order of the Court made herein on October 7, 1933, renews its original motion, now on file herein, to vacate and set aside the alleged and pretended service of summons upon the defendant, and moves the court to vacate and set aside such alleged and pretended service of summons upon defendant upon the following grounds:

(1) That the said pretended service of summons upon defendant was made on or about March 1st, 1932, by mailing a copy of the complaint and summons to the Secretary of State of the State of California, and as defendant is informed and believes mailing a copy thereof to one, E. C. Mack, at San Francisco, California.

(2) That the said defendant was not on the 1st day of March, 1932, or at any time during the year 1932 or prior thereto, and is not now a resident or citizen of the State of California, or of the Southern District of Cali-

foria, Central Division; and was not on the 1st day of March, 1932, or at any other time during said year, or at any time prior thereto, and is not know transacting or conducting or carrying on any business within the said State of California or the Southern District of California, Central Division; and that the defendant was not on the said 1st day of March, 1932, or at any other time, and is not now subject to the jurisdiction of the above entitled Honorable Court, or to the jurisdiction of any court, either State or Federal, within the State of California; that said defendant has not authorized the Secretary of State, nor any deputy of said Secretary of State, nor any other person within the State of California to represent it, or to receive service of process or summons for or on its behalf.

(3) That the defendant was not on the 1st day of March, 1932, or at any other time, and is not now, a resident of the State of California, or the Southern District of California, Central Division; nor was said defendant on said 1st day of March, 1932, or at any other time, within the said State of California, or the Southern District of California, Central Division or subject to the jurisdiction of this Honorable Court or of any other court, or the Superior Court of the State of California in and for the County of Los Angeles, wherein said action was commenced, and has not consented and does not consent to be sued either in said Superior Court of the State of California, County of Los Angeles, or in said Southern District of California, Central Division.



(4) That neither the Secretary of State of the State of California, or said E. C. Mack were agents or officers of defendant, or in any way authorized or empowered by defendant to receive or accept service of summons or other process, or to be the subject or object of service of such process upon them or either of them, at the time of such pretended service or at any time.

Said motion will be made, renewed and based upon the summons and complaint, as now on file in this cause, the original motion and notice of motion to quash, vacate or set aside the service of summons, as now on file therein, and the following affidavits used in support of the motion as originally made, and now on file herein, to-wit:

1. Affidavit of Robert V. Jordan of date April 21, 1932.

2. Affidavit of Fred D. Morgan of date April 21, 1932.

3. Affidavit of Martin J. Cabana of date April 21, 1932.

4. Affidavit of Fred D. Morgan of date June 20, 1932.

5. Affidavit of E. C. Mack of date June 25, 1932.

6. Affidavit of Thomas B. Healy of date May 26, 1933.

7. Affidavit of Martin J. Cabana of date May 25, 1933.



Also the following records now on file, To-Wit:

1. Order granting motion to quash, of date November 7, 1932.
2. Order vacating the last mentioned order.
3. Order of date October 7, 1933, denying motion to quash, and permitting the renewal of the motion.

Also the following affidavits hereto attached and served and filed herewith, to-wit:

1. Affidavit of John Brash, of date February 1, 1934.
2. Affidavit of George Savage of date February 1, 1934.
3. Affidavit of J. W. Howell of date February 1, 1934.
4. Affidavit of W G. Heise of date February 1, 1934.
5. Affidavit of Edison C. Loyd of date February 1, 1934.
6. Affidavit of Martin J. Cabana of date August 10th, 1934.
7. Affidavit of Martin J. Cabana of date ....., 1934
8. Affidavit of ..... of date....., 1934.”

# “AFFIDAVIT OF JOHN BRASH

COUNTY OF SAN FRANCISCO )  
 STATE OF CALIFORNIA ) SS

JOHN BRASH, being first duly sworn upon his oath deposes and says:

That he is, and for more than ten years last past he has been superintendent of a warehouse now operated by the Haslett Warehouse Company situated at the corner of Second and Brannan Streets in San Francisco, California, now known as Humboldt Warehouse of the Haslett Warehouse Company, and which up to January 1st, 1932 was known as “Lawrence Warehouse 19.” That the entrance to said warehouse is at 285 Brannan Street and he has been in charge of the business conducted therein.

That as superintendent of said warehouse it has at all times been a part of his duty and business to know, and he has known, of the customers and/or patrons of said warehouse and of the manner and way in which the goods of customers and/or patrons thereof were handled and kept. That the business of said Haslett Warehouse Company and the business conducted in said warehouse now known as the Humboldt Warehouse consisted of a general storage business of merchandise and various articles that might be tendered to it for storage and included the receipt of goods in bulk shipments of carload lots, or lots by water routes from various parts of the United States beyond the boundaries of the State of California, and the taking of such goods and merchandise into said warehouse for the purpose of breaking up such bulk shipments and distributing them to customers of the shippers according to directions furnished by the shippers and for the pur-

pose of receiving such shipments of goods the trains of the different railroad companies connected with a spur railroad track extending into said warehouse, where cars were received and unloaded.

That said warehouse known as the Humboldt was up to January 1st, 1932 one of several warehouses owned and operated by a company known as the Lawrence Warehouse Company, and was known as "Lawrence Warehouse 19", and on said date the warehouses and business of said Lawrence Company were taken over by the Haslett Warehouse Company and thereafter said warehouse became known as the Humboldt Warehouse of said Haslett Company. That upon the taking over of such warehouses and business by the Haslett Company affiant went from the employ of the Lawrence Company into the employ of the Haslett Company and has continued without interruption to be superintendent of said warehouse, and has at all times exercised and possessed the same authority and been charged with and performed the same duties as under his employment by the Lawrence Company, and the business of the warehouse has been conducted in the same manner and to a large extent with the same employees and patrons under both ownerships.

That while affiant was superintendent of said Humboldt Warehouse prior to January 1st, 1932, Mr. Edison C. Lloyd (commonly known as Ed Lloyd) was general superintendent of warehouses of the Lawrence Company, including said Humboldt Warehouse.

That affiant knows, and at all times herein mentioned he has known, of the business concern, Liquid Veneer Corporation of Buffalo, New York, defendant above named, and during all the time of his employment as superin-

tendent as aforesaid, said Liquid Veneer Corporation has been a patron or customer of said Humboldt warehouse and it has been a part of affiant's duty to know and he has and does know in detail how the business with said Liquid Veneer Corporation has been conducted, and how shipments of goods coming from it to either the Lawrence Company or the Haslett Company have been handled, and he states that such business has been conducted and handled as follows :

(1) During all of the time hereinbefore mentioned all goods consigned to and received by Lawrence Warehouse Company, or Haslett Warehouse Company, from Liquid Veneer Corporation have been consigned and received from Buffalo, New York, and have in all instances been received at and taken into, and until disposed of as hereinafter explained, kept in said identical warehouse now known as the Humboldt Warehouse of the Haslett Company, and they did not go into any other of the warehouses of either of said companies.

(2) That there was, at all times, an arrangement and custom between the Lawrence Warehouse Company and Liquid Veneer Corp. (which upon the Haslett Company taking over the business of the Lawrence Company were adopted and acted upon by the Haslett Company) to the effect that Liquid Veneer Corporation would ship its products into said Humboldt Warehouse in carload or other bulk shipments to be broken up and reshipped from the warehouse to customers of Liquid Veneer Corporation in California, and neighboring states to fill orders received by Liquid Veneer Corporation from its customers as the warehouse management should be directed by Liquid Veneer Corporation to make such shipments.

(3) Referring now to all the time of affiant's connection with the operation of the warehouse called Humboldt warehouse, under the control of both the Lawrence and the Haslett Companies, aforesaid, affiant further says:

That from time to time and at varying intervals Liquid Veneer Corporation would consign car-load or car-loads of its product to whichever of the two companies was at the time operating, the said warehouse now known as Humboldt, and would notify said warehouse of such consignment.

(4) That upon the receipt of a bulk shipment of goods from Liquid Veneer Corporation they would be unloaded into said warehouse and segregated from other goods until reshipped as hereinafter stated.

(5) That in connection with the consignment and receipt of such goods the warehouse company would receive by mail from Liquid Veneer Corporation at Buffalo, New York, instructions to break up such bulk shipment and re-ship certain articles and quantities, as itemized in the instructions, to various customers of Liquid Veneer Corporation throughout California and adjoining states. That it sometimes happened that the orders for reshipment received in immediate connection with such shipments were not sufficient to exhaust the bulk shipments then under consideration and that additional instructions would shortly follow and there were occasions when a shipment would not be entirely exhausted by the accompanying orders to reship, which fact would be made to appear to Liquid Veneer Corporation by comparison of their records of the bulk shipments with the warehouse's report of reshipments made, and in regular course additional shipping instructions would be given.

(6) That upon receipt of a bulk shipment of goods, as aforesaid, and directions to distribute the same, as aforesaid, the warehouse force would unload said goods, if they had not already been unloaded, and in either case would segregate them from the goods of others in said warehouse, and from the mass of such goods would fill the shipping directions given by Liquid Veneer Corporation, as aforesaid, and any goods left over after filling such directions would be held until the receipt of further directions for their disposition, as aforesaid.

(7) That in disposing of bulk shipments of goods of Liquid Veneer Corporation, as aforesaid, neither the warehouse or its employees had anything to do with the sale of the same, or with the invoicing of them to the parties to whom they were shipped, and they knew nothing about the sale, the price, the terms of sale or the value of the goods but simply broke the bulk shipment and reshipped it to designated parties in designated amounts, and made out no papers except the ordinary shipping bill or bill of lading, and neither affiant or anyone engaged in the warehouse ever had instructions or permission to sell any of the goods so shipped to them and they were never given or informed of the sales price of such goods, and they were never billed or invoiced out of the warehouse or by the warehouse company and they never did or could quote prices and never sought to or did sell, or assume to sell any of such goods, and they were in no way authorized to represent or act for Liquid Veneer Corporation except in making such shipments, as aforesaid, and were never given authority to or requested to make any representations or statements of any kind concerning the sale of the goods of the Liquid Veneer Corporation, and if any employee of said ware-



house ever made any statements concerning the manner of disposition of the goods of said Liquid Veneer Corporation, or represented that they could be purchased at said warehouse, he was without authority to do so, and was in error for neither the Lawrence or the Hazlett Warehouse Company ever sold or had authority to sell any of such goods, or had information as to the prices at which they were sold or to be sold.

Affiant further says that there has been exhibited and read to him a transcript of the testimony of the plaintiff in this action, Mrs. Smuckler, to the effect in substance that at sometime between the first part of 1930 and the early part of 1932 she visited a warehouse which she called the Lawrence Warehouse, near the water front and in the warehouse district, in San Francisco, and that in that warehouse she conversed with a man occupying a clerical position, such as bookkeeper or billing clerk, in an office back of a wicket; that he stated to her the manner in which Liquid Veneer products were sold; that they could be there obtained from a stock of goods kept on hand and that he exhibited to her bills and invoices and showed her a large stock of Liquid Veneer products kept in a room into which a door opened adjacent to such office and explained that orders taken for such goods would be filled from such stock. That affiant cannot and does not pretend to remember the testimony so read to him with accuracy or in detail, but without regard to what said witness may have testified he states the following facts in addition to all that has been heretofore stated, to-wit:

The warehouse before referred to as the Humboldt warehouse is situated in what is referred to as the water front and warehouse district of San Francisco.



That the entrance to said warehouse building used by persons entering the same is on Brannan Street and one entering comes almost immediately to the warehouse office, which is on the street floor and is separated from the rest of the floor by a high counter surmounted by a wicket through which business with the office is transacted, and that has been the situation during all the times herein mentioned.

That there is no room, and for more than five years past there has been none, on said first floor adjacent to the office into which a door opened from the part of the building occupied by the office and entrance to the building. That a part of the building back of, and the full width of said office has for more than such five year period been partitioned off with no entrance thereto from that part of the building, and no goods of Liquid Veneer Corporation have ever been kept or placed in said room. That for more than five years last past all goods of Liquid Veneer Corporation when received in said warehouse have been immediately segregated from other goods in the warehouse by putting them in the basement of the building, where they have been broken up for reshipment as hereinbefore stated, and to get to the part of the basement into which said goods have been put and kept during said five year period it is necessary to go the width of said building on Brannan Street around the end of the railroad track, extending into the building, thence back the length of the building to a basement stairs and thence down to the basement floor.

That since long prior to the year 1930 the regular clerical force of said warehouse has consisted of one W. G. Heiss, who has been in general charge of the clerical work, and different lady stenographers and since before

the year 1930 said Heiss has been absent from his work not more than a few weeks in all. That when for any reason said Heiss has been absent from the office his place has been taken by one George Savage, and no one but the said Heiss, said Savage and said lady stenographers has since before 1930 been at any time in charge of said office or at work therein and except that at times affiant may have done some of his work therein, and in that behalf affiant says that no occurrence of a woman appearing and seeking information in regard to Liquid Veneer products has taken place, at any time when he was present in the office.

That all other employees than those mentioned who have worked in said warehouse since long before the year 1930 have been engaged in different lines of manual work and none of them have been in charge of, or worked in the office, or had access to the papers therein at any time.

Affiant further says that the warehouse business as at all times conducted by the Lawrence and Haslett Companies (and such business generally in the city of San Francisco) is a confidential business in which it is not ethical or proper to disclose the business of patrons, and that said companies and their employees would not more disclose the names of storers of goods or the extent of their holdings than bank employees would disclose the names of depositors or the extent of their deposits, and that it would have been against all the rules and practices of either of said warehouse companies for an employee to disclose the relations between a patron and said warehouse, or the fact or extent of the storage of goods by any patron, and no employee of either of said companies was ever authorized or permitted by said companies, or

either of them, to make any statements or admissions on behalf of Liquid Veneer Corporation, or any other patron.

Affiant further says that it is his recollection of the testimony of said woman (Mrs. Smuckler) that the goods of Liquid Veneer Corporation which were shown to her were sufficient in quantity to fill a room half the size of the court-room in which she was giving her evidence. That the largest amount of goods of Liquid Veneer Corporation in said warehouse even immediately upon the unloading of the largest shipment ever made to said warehouse would not fill the half of any court-room affiant ever saw, and it would only be upon unloading of one of the largest shipments and before the distribution thereof to customers that goods would be present in quantities large enough to prompt such extravagant statements.

Affiant further says that the Lawrence and Haslett Warehouse Companies were paid by Liquid Veneer Corporation not upon a commission basis or with reference to the sale of any goods but only as warehousemen and such compensation was based upon the number of cubic feet occupied and for the time occupied by the goods while awaiting billing out to different persons by direction of Liquid Veneer Corporation; the labor of handling in and out and the labor, if any, of repacking where that was necessary.

JOHN BRASH  
JOHN BRASH

Subscribed and sworn to before me this 1st day of  
February, 1934

VIOLET NEURNBURG  
Notary Public in and for the County of San Francisco,  
State of California."

# “AFFIDAVIT OF GEORGE SAVAGE

STATE OF CALIFORNIA                    )  
COUNTY OF SAN FRANCISCO ) SS

GEORGE SAVAGE being first duly sworn upon his oath deposes and says:

That for several years prior to 1930 and up to the 1st of January, 1932, he was in the employ of the Lawrence Warehouse Company and since that date has been in the employ of the Haslett Warehouse Company, working in both said employments in a warehouse at the corner of Second and Brannan Streets in San Francisco, known first as “Lawrence Warehouse 19” and later as “Humboldt” warehouse of the Haslett Company.

That a part of his work in said warehouse was that of conducting the office and doing the work of the regular office manager W. G. Heiss in the absence of said Heiss from his work and on all occasions when said Heiss was absent affiant did assume his place. That during each year 1930 and 1931 affiant did relieve said Heiss during his vacation period for about two weeks in each year, and perhaps on some other short periods, and he had likewise relieved him during prior years and no one else took over the work of said Heiss during any of his absences.

That in connection with his work in the office during the absence of Mr. Heiss he became very familiar with the manner of handling the business of Liquid Veneer Corporation in said office and he has read the affidavit of said W. G. Heiss in this case and states the fact to be that said affidavit correctly states the facts with relation thereto as he would state them in detail, if called upon to do so.

Affiant further says that there has been exhibited and read to him what purported to be a transcript of the testimony of Mrs. Smuckler, the plaintiff in this action, concerning an interview with a man in the office of a warehouse referred to as the "Lawrence Warehouse" to the general effect that some time between the first part of the year 1930 and the early part of the year 1932 she visited a warehouse which she called the Lawrence Warehouse, near the water front and in the warehouse district in San Francisco; and that in that warehouse she conversed with a man occupying a clerical position, such as book-keeper or billing clerk, in an office back of a wicket; that he stated to her the manner in which Liquid Veneer products were sold; that they could be there obtained from a stock of goods kept on hand and that he exhibited to her bills and invoices and showed her a large stock of Liquid Veneer products kept in a room into which a door opened adjacent to such office and explained that orders taken for such goods would be filled from such stock. That affiant cannot and does not pretend to remember the testimony so read to him with accuracy or in detail, but without regard to what said witness may have testified he states the following facts in addition to all that has been heretofore stated, to-wit:

The warehouse before referred to as the Humboldt warehouse is situated in what is referred to as the waterfront and warehouse district of San Francisco.

That the entrance to said warehouse building used by persons entering the same is on Brannan Street and one entering comes almost immediately to the warehouse office, which is on the street floor and is separated from the rest of the floor by a high counter surmounted by a

wicket through which business with the office is transacted, and that has been the situation during all the times herein mentioned.

That there is no room, and for more than five years past there has been none, on said first floor adjacent to the office into which a door opened from the part of the building occupied by the office and entrance to the building. That for more than five years past all goods of the Liquid Veneer Corporation when received in said warehouse have been immediately segregated from other goods in the warehouse by putting them in hte basement of the building where they have been broken up for reshipment in accordance with orders and directions of the Liquid Veneer Corporation and to get to the part of the basement where said goods have been kept during said five years last, starting from the office, it is necessary to go the width of said building on Brannan Street, around the end of the railroad track, extending into the building, thence back the length of the building to basement stairs and thence down to the basement floor.

That at no time while affiant was in charge of or present at the said office did any woman appear and make inquiry in regard to the products of the Liquid Veneer Corporation, and no stock or goods of the said Liquid Veneer Corporation, were ever exhibited to any woman, and that if any such thing had occurred affiant would have remembered the same because it would have been distinctly out of the ordinary in that by the rules and practices of the warehouse nothing in regard to the business



of patrons is ever disclosed but the same is deemed to be and is considered confidential and if any person had made any request for information in regard to the goods or business of the Liquid Veneer Corporation, affiant would either of his own responsibility have refused to give the same or would have referred the inquiry to Superintendent John Brash. That during all the time of affiant's employment with either the Lawrence Warehouse Company or the Haslett Warehouse Company such matters have been considered and treated as confidential.

That if at any time there were sufficient goods of the Liquid Veneer Corporation on hand in the said warehouse to fill a room as large as a freight car it would have been immediately after receipt of a car-load shipment and before the operation of reshipment had been accomplished; that it is affiant's recollection of the reading of the testimony of plaintiff that she stated that the goods of Liquid Veneer Corporation were present and exhibited to her in quantities sufficient to fill a room one-half the size of the courtroom in which she was testifying.

Further affiant sayeth not.

GEORGE W. SAVAGE  
GEORGE SAVAGE

Subscribed and sworn to before me this 1st day of February, 1934.

VIOLET NEURNBURG  
Notary Public in and for said County and State."



"AFFIDAVIT OF J. W. HOWELL

STATE OF CALIFORNIA                    )  
COUNTY OF SAN FRANCISCO    ) SS.

J. W. HOWELL, being first duly sworn upon his oath deposes and says:

That he is and for ..... years last past has been the secretary of the Haslett Warehouse Company doing business as a warehouseman in the City of San Francisco. That on the 1st day of January 1932, the Haslett Warehouse Company took over the warehouses and business of the Lawrence Warehouse Company, that up to that time had been doing a similar warehouse business in San Francisco, taking over among other things the business and possession of a warehouse at the corner of Brannan and Second Street in said city, up to that time known as "Lawrence Warehouse 19" now known and designated as "Humboldt" warehouse of the Haslett Company.

That at the time the Haslett Company took over said warehouse John (Jack) Brash was the superintendent in charge, W. G. Heiss was in charge of the office and the clerical work and records and George Savage was employed in various Capacities and as a substitute for Mr. Heiss in case of his absence from the office. That said named persons were continued in their several capacities as employees of the Haslett Warehouse Company and have ever since maintained their respective positions.

That one of the patrons of said warehouse before its acquirement by the Haslett Company was Liquid Veneer Corporation of Buffalo, New York, and it has continued as a patron to this time and the course of business existing between it and the Lawrence Warehouse Company has been continued and followed and all consignments of

goods by Liquid Veneer Corporation to either said Lawrence Company or the Haslett Company have gone into and been handled through said identical warehouse known now as the "Humboldt" and the details of the handling of such goods are better known to said Brash, Heiss and Savage than to affiant, who has no connection with the Lawrence Warehouse Company and its transactions prior to January 1st, 1932.

That affiant has been for many years actively connected with the warehousing business such as conducted by the Lawrence and the Haslett Companies and knows the character of such business, and the relationship between such warehousemen and patrons during all of the said time and in that behalf he states the fact to be that such business in the City of San Francisco is a confidential business in which it is, and has been, considered unethical and improper for warehousemen to disclose for whom they are storing or shipping goods as such information would expose owner of goods to the danger of attachments or other process and in the case of making reshipments would disclose to competitors the customer lists of patrons; and employees of such storage companies are universally forbidden to give out any information concerning patrons or their affairs very much as bank employees are restrained from disclosing the accounts of customers.

Further affiant *sacety* not.

J. W. HOWELL

J. W. HOWELL

Subscribed and sworn to before me this 1st day of February, 1934

VIOLET NEURNBURG

Notary Public in and for said County and State."

HEISE W.G.H.  
 "AFFIDAVIT OF W. G. ~~HEISS~~ U.N.N.P.

COUNTY OF SAN FRANCISCO )  
 STATE OF CALIFORNIA ) SS

HEISE W.G.H.

W. G. ~~HEISS~~, being first duly sworn deposes and says:

Heise W.G.H.

That he is the identical W. G. ~~Heiss~~ U.N.N.P. mentioned in the affidavit of John Brash taken in this case.

three W.G.H. U.N.N.P.

That for about ~~five~~ years immediately preceding January 1st, 1932 he was in the employ of the Lawrence Warehouse Company and from January 1, 1932 to the present time he has been in the employ of the Haslett Warehouse Company both of San Francisco, California. That for many years prior to January 1st, 1932 the Lawrence Warehouse Company was engaged in a general warehousing and storage business in San Francisco, and among others it conducted a warehouse at the corner of Second and Brannan Streets in said city known as "Lawrence Warehouse 19." That on January 1st, 1932 the business and warehouses of said Lawrence Company were taken over by the Haslett Warehouse Company which continued the business of the Lawrence Company and from shortly after that time the said warehouse Lawrence 19 was designated and known as the "Humboldt" warehouse of the Haslett Company. That upon the succession of the Haslett Company to the business of the Lawrence Company, the employees at said warehouse, Lawrence 19, were continued as employees of the Haslett Company, including - - - John (Jack) Brash, George Savage and affiant and the business of said warehouse

continued with the same patrons and customers. That prior to such change of ownership and control one Edison C. Lloyd was general superintendent of warehouses but under the new ownership and control J. W. Howell succeeded to the duties of said Lloyd but his offices are not in the warehouse but in the executive offices of the Haslett Warehouse Company, he being its secretary.

That during all the time of his employment by said two companies he has been in charge of the office and office work of said warehouse now called the Humboldt, which has at all times been located on the street floor of the building and reached from without the building through a street entrance at No. 285 Brannan Street. That he had no definite title but his work consisted of the general conduct of the office business with the assistance of various lady stenographers, and of keeping the office records and performing, or having performed, the duties ordinarily performed by a billing clerk and he has been at all times familiar with both the general course of business conducted through said warehouse and the details thereof as far as involved in the records, papers and correspondence. That during occasional brief absences of affiant from his work in said office his work has been taken over and performed by George Savage and during all the course of said employment of affiant in said warehouse no other employee than himself, said Savage and stenographers as mentioned have been engaged in or worked about said office except that on occasions the superintendent, John Brash, might be engaged in some of his work therein and except that after July 1st, 1932 one Mr. Mullins might have assisted in office work.

That during all the time of his employment in said warehouse Liquid Veneer Corporation has been a customer or patron of said warehouse now known as "Humboldt" and the warehouse business transacted by it has gone through his hands and he has personal knowledge of what such business consisted of and how it was conducted and in that regard he states:

Relating to the entire period of his employment, as aforesaid, affiant states: That from time to time Liquid Veneer Corporation would consign to the warehouse now known as "Humbolt" carload or other bulk shipments of its products from Buffalo, New York. That under an arrangement and custom ante dating affiant's employment Liquid Veneer Corporation would in connection with making such a bulk assignment to the warehouse furnish to the warehouse separate directions to the effect that the goods so consigned should be distributed in smaller lots to various customers, the precise articles and amounts to be shipped to each customer being specified in the separate direction as to that customer. That many such directions would generally be mailed and received together and such a group of directions might arrive at the warehouse preceding, concurrently with or shortly following the actual receipt of the goods according to the time occupied in transit.

That upon receipt of a consignment of goods if shipped by rail the car containing them would be switched into the warehouse over a spur extending into it and be unloaded and for about five years last past all goods of Liquid Veneer Corporation have been when unloaded segregated from all other goods and placed in the warehouse basement for reshipment under directions from Liquid Veneer Corporation.

That upon the unloading and segregation of a shipment of goods the warehouse force would proceed to break up the shipment by selecting thereupon the articles and amounts necessary to comply with the several directions then on hand or would await the receipt of expected directions if they had not yet arrived.

That as the articles necessary to comply with shipping directions were selected and set aside for shipment to various parties affiant would proceed in due course to make out, or cause to be made out appropriate shipping or way bills designating the consignee as per instructions and naming the warehouse company as consignor.

That it would sometimes happen that the shipping directions received by the warehouse in connection with a particular shipment would not exactly correspond with the contents of a bulk shipment which would appear to Liquid Veneer Corporation by a comparison of their schedules of shipments with copies of the shipping bills always furnished by affiant to Liquid Veneer Corporation when reshipments were made as per instructions and in the regular course of things if there was any excess, further shipping instructions would be given by Liquid Veneer Corporation, and the remaining goods shipped out. If it should happen that there was a deficiency in goods to fulfill all shipping directions on hand the regular course would be to await another shipment and they comply.

That in making reshipments of goods as above specified the warehouse would not, and it did not furnish, or make



out invoices or bills to the consignees for the goods, and the persons conducting the operation as aforesaid were not furnished any price list and did not know the prices at which any goods were sold or the terms upon which they were received by customers of Liquid Veneer Corporation, and they had nothing to do with the sale of such goods and had no interest in the sale thereof, and had no authority to make sales, but acted as warehousemen only and were compensated upon the basis of the amount of space taken up by the goods while in the warehouse, according to the time they were there and the amount of labor involved in handling, etc.

Affiant further says that there has been exhibited and read to him what purports to be a transcript of the testimony of the plaintiff in this action, Mrs. Smuckler, to the effect in substance that at some time during the years 1930 or 1931, or the early part of 1932, she visited a warehouse, which she called the Lawrence Warehouse, near the water front and in the warehouse district, in San Francisco, and that in that warehouse she conversed with a man occupying a clerical position, such as bookkeeper or billing clerk, he being in an office back of a wicket; that he stated to her the manner in which Liquid Veneer Products were sold; that they could be there obtained from a stock of goods kept on hand and that he exhibited to her bills and invoices and showed her a large stock of Liquid Veneer products kept in a room into which a door opened adjacent to such office and explained that orders taken for such goods would be filled from such



stock. That affiant cannot and does not pretend to remember the testimony so read to him with accuracy or in detail, but without regard to what the said witness may have testified he states the following facts in addition to all that has been heretofore stated, to-wit:

The warehouse hereinbefore referred to as the Humboldt Warehouse is situated in what is referred to as the water front and warehouse district of San Francisco.

That the entrance to said warehouse building used by persons entering the same is on Brannan Street and one entering comes almost immediately to the warehouse office, which is on the street floor and is separated from the rest of the floor by a high counter surmounted by a wicket through which business with the office is transacted, and that has been the situation during all the times herein mentioned.

That there is no room, and for more than five years past there has been none, on said first floor adjacent to the office into which a door opened from the part of the building occupied by the office and entrance to the building. That a part of the building back of, and the full width of said office has for more than such five year period been partitioned off with no entrance thereto from that part of the building, and no goods of Liquid Veneer Corporation have ever been kept or placed in said room. That for more than five years last past all goods of Liquid Veneer Corporation when received in said warehouse have been immediately segregated from other goods in the warehouse by putting them in the basement of the building,

where they have been broken up for reshipment as hereinbefore stated, and to get to the part of the basement into which said goods have been put and kept during said five year period it is necessary to traverse the said building on Brannan Street around the end of the railroad track, extending into the building, thence back the length of the building to a basement stairs and thence down to the basement floor.

That the only times affiant was absent from the performance of his duties since the beginning of the year 1930 were two weeks of vacation in said year and two weeks in the year 1931, and that during the year 1932 he was not absent at all; that during the period of his absence his place was taken, and the office was in charge of George Savage, hereinbefore mentioned.

Affiant further says that at no time during his employment and while he was in charge of the said office did Mrs. Smuckler, or any other woman appear and have any conversation with him in regard to the manner in which the goods of Liquid Veneer Corporation were kept or concerning the subject of their being for sale, or concerning whether they could be bought and delivered from a stock on hand in the said warehouse, or in any way concerning and relating to the goods of the Liquid Veneer Corporation, or how they were handled and kept in said warehouse, and never at any time did he exhibit or show to any woman bills or invoices or other papers concerning the shipments and handling of goods of the Liquid Veneer Corporation in the said warehouse, and that at no time

during the handling of said goods have way bills or invoices of goods of the Liquid Veneer Corporation shipped from the warehouse been made out and been present in the office of said warehouse and never at any time did he show the said Mrs. Smuckler, or any woman, around the store houses and point out to her or in any way exhibit to her goods belonging to or bearing the brand of Liquid Veneer Corporation, and he never made any statements to any woman of the kind or character said to have been testified to by Mrs. Smuckler as having been made by the man she found in charge of the office of the warehouse she visited.

That if any such occurrence as that referred to in the preceding paragraph had ever taken place affiant could not help but remember and he would have remembered it because it would have been so out of the ordinary and out of accord with the practices of said warehouse; that the warehouse business as conducted between said Liquid Veneer Corporation and the Lawrence and Haslett Warehouse Company is treated and conducted as a confidential business and it is against the rules and practices of the warehouse to disclose in any way to any person the names of, or any facts in regard to people having goods there on store and it has been a well-known and universal practice among all employees of said warehouse to preserve such business relations as confidential.

Affiant further says that it would be impossible for anyone to see in the said office invoices or bills or any other documents or papers made out in connection with the re-

shipment of goods because no such papers were ever present therein, and the only papers ever made out in said office concerning the shipment of goods were the way bills or shipping bills and they were universally made out on a printed form filled in with pen and ink.

Affiant further says that it is his recollection of the testimony of the witness referred to that the goods of the Liquid Veneer Corporation which were shown to her were sufficient in quantity to fill a room half the size of the court-room in which she was giving her evidence. With reference to that, affiant further says that the only times at which a large amount of goods sufficient to fill a freight car, for example, were present in the said warehouse would be at times immediately after the unloading of a carload shipment and before the same had been distributed by re-shipment, and there has never been present at one time in the said warehouse goods sufficient to half fill a large room such as the witness described as being one-half the size of a court room.

W. G. HEISE

Subscribed and sworn to before me this 1st day of  
February, 1934

VIOLET NEURNBURG

Notary Public in and for said County and State."

## "AFFIDAVIT OF EDISON C. LLOYD

CITY AND

COUNTY OF SAN FRANCISCO )  
STATE OF CALIFORNIA ) SS

EDISON C. LLOYD, being first duly sworn upon his oath deposes and says:

That from a time several years prior to 1930 he was general superintendent of the warehouses of the Lawrence Warehouse Company of San Francisco, California, which included a warehouse situated at the corner of Second and Brannan Streets in said city, which is now known as the Humboldt Warehouse of the Haslett Warehouse Company, but which up to January 1st, 1932 or shortly thereafter was known as "Lawrence Warehouse 19." That it was a part of affiant's business and duty to know what customers or patrons of the Lawrence Warehouse Company were served by the different warehouses operated by said Company.

That during all the time of his connection with the Lawrence Warehouse Company as aforesaid affiant knew of the business concern, Liquid Veneer Corporation of Buffalo, New York, which is defendant above named, and knows that during all of such employment and up to January 1st, 1932 various products of said Liquid Veneer Corporation were consigned from Buffalo, New York, to, and received by Lawrence Warehouse Company for distribution to customers designated by said Liquid Veneer Corporation.

That during all of said time all goods received by said Lawrence Warehouse Company from said Liquid Veneer

Corporation were received at and taken into said identical warehouse, then known as Lawrence Warehouse 19, now known as the Humboldt Warehouse of the Haslett Warehouse Company, and they were never received at or went into any other warehouse.

That January 1st, 1932 the warehouse business and warehouses of Lawrence Warehouse Company including said Lawrence Warehouse 19, now known as Humboldt Warehouse of the Haslett Warehouse Company were taken over by the Haslett Warehouse Company, which continued to conduct said business and warehouses formerly conducted by Lawrence Warehouse Company.

That affiant has had no connection with such warehouse business, or either the said Lawrence Company or said Haslett Company, since January 1st, 1932, and knows nothing about the details of the manner of conducting business in said warehouses or the customers thereof since about that time, and he is now in the employ of the South End Warehouse Company of San Francisco.

Further affiant sayeth not.

EDISON C. LLOYD

Subscribed and Sworn to before me this 1st day of February, 1934.

KATHERYN E. STONE

Notary Public in and for the said City and County and State."

## "AFFIDAVIT OF MARTIN J. CABANA

CITY OF BUFFALO       )  
COUNTY OF ERIE       ) SS.  
STATE OF NEW YORK )

MARTIN J. CABANA, being first duly sworn upon his oath deposes and says:

That he is the Vice-President of the defendant Liquid Veneer Corporation in charge of sales and shipments, and has been such officer since 1925, and Secretary and Sales Manager before said time since 1903. That as such officer he has been at all times familiar with and had personal knowledge of the facts herein after stated. That this affidavit is made in support of defendant's renewed motion to dismiss and quash the service of summons herein, and is in addition to and supplemental of his affidavits theretofore made, and now on file in support of the original motion to dismiss and quash and set aside the service of said summons.

That for more than thirty-three years last past defendant under its present name and the name of Buffalo Specialty Company has been engaged at Buffalo, New York in the business of supplying its products to customers in California and other states upon mail orders transmitted to it at Buffalo, New York, from said several other states.

That as concerns the State of California its products have during all of the time since the year of about 1910 been supplied to persons within said state by the following methods and none other:



(1) By approving and filling orders received by mail or telegraph at Buffalo, New York, direct from persons desiring to purchase the same and shipping the orders by mail or common carrier direct to the ordering party in California and billing therefor and receiving remittance of the purchase price thereof at Buffalo, New York, from such purchaser.

(2) By approving and filling orders received at Buffalo, New York, by mail or telegraph from traveling salesmen on a commission basis only taking orders from customers within the state of California and forwarding them from within that state to defendant at Buffalo, New York, for approval and upon receipt of such orders if approved shipping and billing the ordered articles direct by mail or common carrier to the ordering party in California and receiving the remittance therefor at Buffalo, New York.

(3) By approving, billing and receiving remittances for orders received at Buffalo, New York, by mail or telegraph either direct from the ordering parties or from commission salesmen taking orders from people within the State of California subject to approval by the company at Buffalo, New York, and if approved shipping the aggregate of a large number of such orders to, first, and up to about January 1st, 1932, the Lawrence Warehouse Company, and, second, after about January 1st, 1932 to the Haslett Warehouse Company, both at San Francisco, California, in bulk by carload or other bulk shipment to be by said warehouse companies reshipped in smaller lots to the various persons whose orders were to be filled.

That in making shipments of all orders during all the times mentioned they were billed to the respective ware-

house companies at the address of the particular warehouse situated at the corner of Brannan and Second Street—the Street number of which was 285 Brannan Street—and the name of which was first “Lawrence Warehouse 19” and later “Humboldt” warehouse of the Haslett Company.

Affiant further says that orders for goods were only filled under either of said three methods, when and after they had been approved by the proper officer of the company at Buffalo and all orders were received by the company subject to their approval or rejection at Buffalo and no one outside the office of the company at Buffalo was authorized or permitted to approve any order or authorize shipment of any goods or extend any credits whatsoever and if any person other than the proper officers of the company, at the home office, had assumed to approve an order or authorized a delivery of the goods or the extension of any credit whatsoever his actions would not have been recognized and no goods would have been shipped or credit extended and that fact was always known to salesmen taking any orders to be a definite policy and they were instructed in all cases that no order could or would be filled until approved at Buffalo, New York, by the officers of the company and that no business could be done or transacted with Liquid Veneer Corporation except at Buffalo. That in so organizing and conducting its business it was the deliberate policy and purpose of defendant to engage in interstate business only and not to in any way conduct any intrastate business.

Affiant further says that in the furnishing of its products to persons in California and other states as well under the third method above mentioned the universal pro-

cedure was as follows during all of the period since the year 1910, to-wit:

That during said time it, defendant, made no shipments whatsoever to any warehousemen in the State of California except, first, said Lawrence Warehouse Company, and since January 1st, 1932, said Haslett Warehouse Company at San Francisco.

That shipments to said warehouse companies from time to time were not solely for reshipment or distribution to persons in California but also for customers in Washington, Oregon and other adjacent states and as the case might be to make a carload lot for economy of distribution.

That from time to time when it would appear from the number of orders coming into the office at Buffalo, from California and surrounding states, that a bulk shipment could soon be made for distribution in said states, the goods called for by said orders would not be shipped direct to the parties ordering but the orders would be accumulated until taking into account the time required for a carload or other bulk shipment to reach San Francisco it was estimated that the orders accumulated by the time of arrival would equal the contents of bulk shipment and thereupon such shipment would be made to either said Lawrence or Haslett Company according to the time when made. That upon the making of such a shipment or shortly thereafter and in due course of business the office at Buffalo would forward to the warehouse at San Francisco separate directions to reship to the parties whose orders were to be filled certain specified kinds of merchandise which were listed in the several instructions. That such separate instructions would generally go forward by

mail in a group following a given shipment so as to reach San Francisco on or about the estimated time of arrival of the freight shipment, and would be followed by additional instructions which it was estimated would arrive at the warehouse by the time it was ready to complete reshipments.

That it was the purpose and aim of defendant not to accumulate any surplus of goods in California and if it appeared that the goods shipped to the warehouse exceeded the amount of goods directed to be shipped from the warehouse, additional shipping directions would be forwarded, or if there appeared to be a deficiency in goods to meet shipping directions the goods would either be shipped to the customer direct from Buffalo or be shipped from the next shipment in bulk. That on some occasions orders for goods may have been cancelled or the approval revoked after a bulk shipment had been made as aforesaid, and as a result thereof a small surplus of goods might at times have accumulated in the warehouse for a short time until that fact was discovered from checking the records whereupon additional shipping instructions would be given to fill additional orders but except immediately upon the receipt of a bulk shipment and after receipt and before the reshipping process was completed was there ever any large amount of defendant's goods in warehouse in California.

With particular regard to the testimony heretofore given by plaintiff to the effect that she saw and conversed with some unidentified man in the office of a warehouse in San Francisco during the years 1930, 1931 or 1932 to the general effect that at some time between the first part of 1930 and the early part of 1932, she visited a warehouse

which she called the Lawrence Warehouse, near the water front and in the warehouse district, in San Francisco, and that in that warehouse she conversed with a man occupying a clerical position, such as bookkeeper or billing clerk, in an office back of a wicket and that said man stated to her the manner in which Liquid Veneer products were sold and that they could be there obtained from a stock of goods kept on hand and that he exhibited to her bills and invoices and showed her a large stock of Liquid Veneer products kept in a room into which a door opened adjacent to such office and explained that orders taken for such goods would be filled from such stock; that affiant says that he has no means of knowing whether plaintiff had any such conversation as detailed by her but in that behalf he deposes and says that never at any time has any person in any warehouse or elsewhere in the State of California been employed or authorized by defendant, directly or indirectly, to sell goods on its behalf or to extend credits or to represent that he had authority to sell goods or to speak for or on behalf of defendant with reference to its method of doing business or to have in his possession purported bills or invoices of goods of defendant, or to be in charge of any goods of defendant except as hereinbefore stated with reference to the handling of bulk shipments of goods to the warehouse companies aforesaid, and neither of said warehouse companies or any of their employees have ever been directly or indirectly authorized to do any of said things and no bills or invoices of goods distributed by defendant through said warehouses were ever in the authorized possession of anyone in California except the purchaser of goods to which they were sent direct from Buffalo and neither said warehouse companies or any of their employees were ever fur-

nished with prices of defendant's products and they would not know the prices at which such goods would or should be sold and except immediately after the arrival of a bulk shipment there was no time at which goods of the defendant were present in any warehouse except in small quantities as an incident of reshipments as aforesaid. That if any person pretending to act on behalf of defendant ever had any conversations with plaintiff of the character referred to or exhibited to plaintiff any bills or invoices for goods of defendant such person was an imposter and such bills and invoices were spurious because no such bills or invoices ever went into the hands of any warehouse or its employees and under the course of business and the practices actually carried out neither of said warehouse companies or their employees had any thing to do with billing or invoicing shipments of goods of defendant but that was all done in all cases from the office of the Liquid Veneer Corporation in Buffalo, New York. To make emphatic and definite to the upmost possible extent that defendant had no one representing it in California authorized to act for it in the matters above referred to as having been testified to by plaintiff affiant further says that the establishment or employment of a person in or about any warehouse to present or act for defendant except in handling bulk shipments of goods was never discussed with any person or ever considered by defendant.

Further deponent sayeth not.

MARTIN J. CABANA

Subscribed and sworn to before me this 10th day of August 1934.

C. B. McCOLLUM

Commissioner of Deeds in and for the City of Buffao,  
New York."



After argument,

THE COURT ORDERED, "The Motion is Denied. Exception for the defendant. Bring the Jury in. Are you going to have an opening statement?"

## SUBSTITUTIONS OF ATTORNEYS

### For the plaintiff:

2-24-33, Harry Graham Balter and Elijah M. Smuckler for Elijah M. Smuckler.

5-7-35, at time of trial, Harry Graham Balter and Isador I. Smuckler for Harry Graham Balter and Elijah M. Smuckler.

For the defendant: each reciting the substitution was for purpose of special appearance only and not to be considered a general appearance in the action by defendant;

8-12-32, J. F. T. O'Connor for Norman S. Sterry and Gibson, Dunn & Crutcher;

1-17-35, Paul V. Sheehan for J. F. T. O'Connor and A. G. Divet.

## "NOTICE TO PRODUCE.

To the defendant above named, and to Paul V. Sheehan, Esq., 1712 Liberty Bank Building, Buffalo, New York, its attorney:

You and each of you will please take notice that you are hereby directed and required to produce upon the trial of said action the following instruments, papers and documents:

1. Carbon copy of letter of June 2, 1931, addressed to Young's Market, Seventh Street, Los Angeles, California,



and signed by Liquid Veneer Corporation, Martin J. Cabana, Vice-President, as set out in paragraph VI of the complaint herein.

2. The paper carton, label, bottle and specimen of product called "Liquid Veneer Polish", as manufactured by defendant company on June 2, 1931.

3. All correspondence between Liquid Veneer Corporation and Young's Market Company, of Los Angeles, California for the years 1929, 1930, 1931, and 1932, relating to "French Veneer Polish" or French Veneer Manufacturing Company, Los Angeles, California, or relating to Mrs. L. S. Smuckler of Los Angeles, California.

4. All correspondence between Liquid Veneer Corporation and the May Company, of Los Angeles, California, for the years 1929, 1930, 1931 and 1932, relating to "French Veneer Polish" or French Veneer Manufacturing Company, Los Angeles, California.

5. The company's records for the years 1929, 1930, 1931 and 1932 showing all merchandise shipped to San Francisco, California, and also showing all merchandise distributed from San Francisco to points in California, also all defendant's bills of lading, invoices and orders during said period in connection with said shipments.

6. All records showing warehousing of Liquid Veneer Polish by the defendant company with the Haslett Warehouse, 37 Drum Street, San Francisco, or the Lawrence Warehouse, Company in San Francisco, California. Also all inventories of merchandise kept at either of these warehouses on account of the defendant company during the years 1929, 1930, 1931 and 1932.

You will further take notice that upon your failure to produce said papers, instruments and documents, secondary evidence of the contents thereof will be offered and introduced on behalf of the plaintiff.

Dated this 1st day of February, 1935.

PELTON, WARNE & BALTER

(Signed) By Harry Graham Balter  
Attorneys for plaintiff."

### THE TRIAL

The jury was duly impaneled and sworn to try the issues. It was admonished by the Court and retired from the Court room when the following proceedings were had out of its presence.

Counsel for defendant moves to dismiss the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The Court states, "No, I will not entertain at this time a motion addressed to the sufficiency of the complaint because of its being entirely untimely."

SHEEHAN: I would take it that at any time we could move to dismiss the complaint as not stating a cause of action.

THE COURT: No.

SHEEHAN: Otherwise, if you haven't got a cause of action stated they are not in Court.

THE COURT: Proceed in the manner indicated, and your Motion is denied; that is I will decline to hear it at this time because, out of all fairness to the Court, such a motion should have been presented a long time ago if there was any intention on the part of the defendant to present any such question as that.

SHEEHAN: Well, of course we intended to but we thought we could present it on the opening of the trial.

THE COURT: Proceed.

After opening statement by Mr. Balter on behalf of plaintiff, the following proceedings were had:

SHEEHAN: Your Honor, at this time I want to make a motion to dismiss the complaint on the plaintiff's opening, for the fact that he has read the complaint to the jury and it does not allege any jurisdictional facts. There is nothing in the complaint of anything that says in this letter that it was alleged of and concerning this plaintiff; that there is nothing alleged in the complaint in any way that shows a publication of what he claims is libel in any way, shape or manner; and there are no facts of damage alleged in any way; there is nothing in the complaint that shows it was an unprivileged communication—.

THE COURT: There is what?

SHEEHAN: There is nothing in the complaint that shows it was not privileged; in other words, there is no allegation that it was libelous and an unprivileged communication.

THE COURT: Motion is denied.

MR. SHEEHAN: And exception.

(Testimony of Evelyn Schoos)

After opening statement on behalf of defendant the following occurred:

EVELYN SCHOOS,

witness on behalf of plaintiff, was sworn and after stating her name and that she was employed by Young's Market Company, the following proceedings took place:

MR. SHEEHAN: Now, your Honor, to preserve my rights I just at this time wish to object to any evidence being introduced as to any allegations of the complaint, and particularly with reference to this letter and any allegations contained in respect to the letter alleged in the complaint, on the ground that the complaint does not state facts sufficient to constitute a cause of action in that there is no libel alleged in the complaint; and on the second ground, that the letter therein contained is a privileged communication under the laws and statutes of California; on the third ground that there is no publication of the libel alleged in the complaint; and the fourth ground, that the complaint in no way, shape or manner in any way indicates that this letter has been in any way of and concerning this plaintiff Lena G. Smuckler in any way; that the only reference in the letter is to a "French Veneer" and the name of Mrs. Smuckler does not appear; and that there is not any indication in the letter in any way, shape or manner that the defendant ever knew of this plaintiff; and on the further ground that there is no element of damage of any name, nature or description alleged in the complaint, and that no allegation of general damages has been made or no allegation of general damages is sufficient.

(Testimony of Evelyn Schoos)

THE COURT: I understand counsel suggests that he will amend, or proposed amendment to his complaint respecting the matter of doing business.

MR. BALTER: At this time for the purpose of the record, although we do not think it is necessary, we ask leave of Court to amend paragraph II of the complaint, reciting "That at all times herein mentioned, LIQUID VENEER CORPORATION WAS, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York." ask that we amend that to include by interlineation the clause "and doing business within the State of California."

MR. SHEEHAN: May I suggest that your Honor let me have a ruling before you pass upon his amendment?

THE COURT: In view of the proposed amendment the objection is overruled.

MR. SHEEHAN: Exception.

THE COURT: Exception to the defendant. Proceed.

It was proposed the amendment be by interlineation, adding clause "and has at all times herein-after mentioned been doing business in the State of California."

MR. SHEEHAN: I object to the amendment being allowed on the ground that it creates a cause of action that has not existed, and that it injects entirely new matter in this complaint which, of itself, is insufficient to constitute a cause of action and of grounds of lack of jurisdictional allegations. And I would like to take an exception to that.

THE COURT: Yes, overruled. The amendment may be allowed.

(Testimony of Evelyn Schoos)

Witness then testified:

I am and have been since November 1929, employed by Young's Market Company. Until August of last year I was Secretary of P. N. Young, Secretary-Treasurer of Young's Market Company, who has retired because of ill health. He had certain correspondence in his private files. About May 1, 1931, in compliance with Subpoena issued out of this Court, I made an effort to find the original of a letter dated June 2, 1931, addressed to Young's Market, 7th Street, Los Angeles, California, signed by "Liquid Veneer Corporation, Martin J. Caban, Vice-President." Prior to that time I had tried to find this same letter at the request of the plaintiff or her attorneys. I searched the complete files of the office and could not find a copy of the letter or an original letter.

Q: I show you here what purports to be a copy of a letter dated June 2, 1931, addressed to Young's Market, 7th Street, Los Angeles, California, signed "Liquid Veneer Corporation, Martin J. Cabana, Vice-President" and ask you to examine it and state whether or not you can tell that that is copied on stationery used by the Young's Market Company.

Defendant objected to the testimony as incompetent, irrelevant and immaterial and that the original letter should be introduced instead of what is purported to be a copy thereof. The objection was overruled, exception taken and the witness testified.

We used stationery similar to this bond paper and as far as I know this came from our office.

(Testimony of Elijah M. Smuckler)

On

### CROSS-EXAMINATION

she testified.

Lots of people used that type of bond paper, it is a standard product and I do not contend that the only people that used this bond was Young's Market.

ELIJAH M. SMUCKLER,

called as a witness for plaintiff was sworn and testified on direct examination:

I am a son of the plaintiff. On or about March 1932, I went to Young's Market and there spoke to P. N. Young, an officer of the Company. I am not familiar with what office he held. I believe he was a Vice President or Secretary, one or the other. He was the managing officer of the Young's Market Company in charge of that department. He exhibited to me a letter on the stationery of the Liquid Veneer Corporation. I received a type written copy of the letter which I compared with the original letter, word for word, and I found that the copy compared the same with the original letter. I left the original letter with Mr. Young and drafted my complaint on the copy. - - - Subsequent to the filing of the complaint I went back to Young's Market and Mr. Young was not there. This copy which purports to be a letter dated June 2, 1931, addressed to "Young's Market, Seventh Street, Los Angeles, California" and signed "Liquid Veneer Corporation, Martin J. Cabana, Vice-President" is a copy of the letter which was given to me at Young's Market when I requested the original. This is the document that was given to me at the store.



(Testimony of Elijah M. Smuckler)

MR. BALTER: All right. At this time, your Honor, having first served a notice to produce on the defendant, to produce their office carbon copy, which they have failed to produce, and having shown that the original records are lost or cannot be found, and having shown that the original complaint or the letter set out in the original complaint was copied from a letter actually in existence, we have a right to prove by secondary evidence which we offer in evidence at this time the copy of the original letter as Plaintiff's Exhibit 1.

The copy of letter was admitted as plaintiff's Exhibit 1.

On

#### CROSS-EXAMINATION

the witness testified.

I am an attorney and was the original attorney of record. I withdrew as such because of taking the witness stand here and did not desire to act as a witness and also as attorney in the case at the same time. That is the only reason. Since the inception of this action I have been suspended from the practice of law by the Bar Association of California, and have been suspended from the State Courts on specifications contained in a charge.

I was informed that Mr. Young had such a letter by my mother. She was informed by Mr. Young. I know of no relation of mine or my mother in the Young's Market or employed there.

(Testimony of Paul V. Sheehan)

Discussion followed between the Court and the attorneys as to the original letter; Counsel for plaintiff stating that P. N. Young, who had the original letter, has been declared incompetent and his records cannot be had. The Court suggested the document be placed in evidence. The defendant took an exception to its admission on the ground that it was incompetent, irrelevant and immaterial and not binding on the defendant. Counsel for defendant stated he received a Notice to Produce through the mail and had made a search for the copy of letter but could not find it. The Court then directed Mr. Sheehan, attorney for defendant, to take the witness stand.

PAUL V. SHEEHAN,

after being first sworn testified:

"I do not know of my own knowledge that the defendant in this action did not have a carbon copy or any copy of the original letter except that I asked for it and I have the note in my file in which I think I requested it. They say they have not got it. This is the best of my knowledge. I have no officer here to testify that the copy is not in existence.

Counsel for plaintiff states he desires to read the letter to the jury, when counsel for defendant announces "This is all under my objection and exception." The letter is then read as follows:

(Testimony of Paul V. Sheehan)

“LIQUID VENEER CORPORATION,  
London, England — Bridgburg, Canada.

Manufacturers of  
HOUSEHOLD AUTOMOTIVE  
SPECIALTIES.

Buffalo, N. Y., U. S. A.

Youngs Market

7th Street

Los Angeles, California

June 2, 1931

Gentlemen: Attn: General Manager.

Our inspector reports your selling and offering for sale a product called ‘French Veneer’, this is to inform you that our attorneys have advised us this is a flagrant violation of our trademark ‘Liquid Veneer’ as well as our common law rights.

We recently found this product on sale at the May Company. We have explained our position to the May Company and they have taken the product off sale and have promised that they will no longer sell it. You perhaps know, or you can ascertain from any patent attorney, that the sale of an infringing product by a dealer or jobber, is looked upon in the United States District Courts as contributory infringing, and such dealer or jobber is equally liable with the manufacturer of the product.

We have had more or less difficulty with these people who manufacture this so-called ‘French Veneer’, have tried to purchase evidence against them individually, but they moved around from one place to another, denied their

(Testimony of Paul V. Sheehan)

identity when we did catch up with them and after investigating them found their financial condition such as would not warrant litigation.

It is a different matter, however, where we find a responsible house, like yourselves, handling an infringing product, because at the end of a lawsuit we will be able to collect damages as well as secure a permanent injunction restraining you from ever again selling or offering for sale said infringing goods.

When a manufacturer induces you to sell his infringing product, he is selling you a lawsuit. We are not in business to sue people, we much prefer doing them a favor, but you will see that we are only endeavoring to protect our property, just as you or anyone would do if in our position. We therefore request that you immediately discontinue the sale of this infringing product and advise us to that effect promptly.

The manufacturer of this product if desirous of building a business rightfully his own, could easily choose many names without taking part of a name belonging to someone else who has spent a fortune in building up their business under that name.

His object for adopting the name 'French Veneer' is obvious. He is trying to trade on our rights. We have evidence now of the innocent housewife purchasing 'French Veneer' at the May store believing she was receiving 'Liquid Veneer' which she had been using for years. This housewife on finding that she had purchased

(Testimony of Paul V. Sheehan)

the wrong Veneer returned it to the May Company and received the proper genuine 'Liquid Veneer'.

We will await your prompt reply, and remain, meanwhile.

Yours very truly,

LIQUID VENEER CORPORATION,  
MARTIN J. CANABA,  
Vice President."

MR. SHEEHAN: In regard to that, your Honor, I ask all the evidence be stricken out, or the letter be stricken out on the ground that it obviously is no libel; that it is a privileged communication between Young's Market and Martin J. Cabana, or the Liquid Veneer; that there is not even a mention of this plaintiff in this letter. There is no allegation in the complaint that says it is of and concerning this plaintiff at all. This plaintiff was doing business under a fictitious name and there is nothing to show in any way that this defendant even knew that there was such a person as Mrs. Smuckler in existence.

THE COURT: It refers to her product, doesn't it, by name?

MR. SHEEHAN: It refers to 'French Veneer', yes, your Honor, but that is not Mrs. Smuckler.

THE COURT: There is no evidence that anybody else was selling or using French Veneer. I think that is a matter that is for the jury to say, whether they have reference to the plaintiff in the action or not, clearly. Overruled, or motion denied. Proceed with the witness.

MR. SHEEHAN: Exception.

(Testimony of Benjamin L. Strauss)

BENJAMIN L. STRAUSS,

Witness on behalf of plaintiff, being sworn, testified as follows; on

DIRECT EXAMINATION,

I am and have been for the past 12 years, merchandise manager and Vice-President of the May Company in Los Angeles. Before that I was Vice-President of a Chicago mail order company; have been in the merchandise business thirty odd years. I have known the plaintiff a little over twelve years, when I came to the May Company, approximately in 1923. At that time Mrs. Smuckler was demonstrating the French Veneer, that is offering it for sale on the fourth floor. I have known the defendant considerably over 15 years and continuously since I came to the May Company in 1923. The May Company has purchased merchandise from the defendant as well as the plaintiff.

Q: MR. BALTER: Did you on or about March, 1929, receive communication from the defendant, Liquid Veneer Corporation with reference to the plaintiff's product?

MR. SHEEHAN: I object to that as irrelevant, incompetent and immaterial in view of the date that is mentioned.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

WITNESS CONTINUED: Yes. This letter, dated March 27th, 1929, was received and has been in my file since that time as a part of the regular business correspondence between me and the Liquid Veneer Corporation.

(Testimony of Benjamin L. Strauss)

Counsel for plaintiff offers the letter in evidence. The defendant objects to it as "irrelevant, incompetent and immaterial and inadmissible under the pleadings, not properly authenticated and in no way relevant to the allegations of the complaint". The objection was overruled. Exception taken. Admitted as plaintiff's Exhibit 2, and read to the jury. The letter being as follows:

"May Department Stores Co.,                      March 27, 1929.  
Broadway & 8th Street,  
Los Angeles, Cal.

Attention: General Manager

Gentlemen:

We are just in possession of legal evidence showing that you are handling and selling a preparation called 'French Veneer' alleged to be made by French Veneer Mfg. Co., Los Angeles, Cal.

Our attorney advises that this is a direct violation of our registered trade mark 'Liquid Veneer' as well as our common law rights, and that in handling this article you are equally liable for damages with the manufacturer thereof.

We have had an experience with this manufacturer dating back to 1913. At that time the party operating this company seemed to be a man and wife by the name of Mr. and Mrs. Smuckler, residing in Los Angeles. We had difficulty locating them because of their having moved around.

Our records here show it was difficult for our representatives to meet the party in charge who was always out



(Testimony of Benjamin L. Strauss)

of town when our people called. Finally we were told by someone to go ahead and do as we saw fit; that they would manufacture and sell French Veneer in spite of any action on our part. Their argument was that they had no financial responsibility, therefore we could not take anything from them.

After a survey of the territory we found their sale was very meager and they apparently, at least for a time were inactive, because of this we allowed the matter to rest for the time being, thinking they would finally desist.

We now find that you have this product in your store and are selling it. We don't know if there are others but by reason of our position we must of necessity kindly ask you to immediately stop the sale of this product and take it off your market so far as you are concerned. We are obliged to request this because were we not to do so we would jeopardize our exclusive rights to our own trade mark 'Liquid Veneer' which you will appreciate is a very valuable one to us. We are in the unfortunate position of demanding of you, a friend and customer, that you immediately stop the sale of this infringing product. We fully believe that you would act likewise were our position reversed.

It is not infrequent that irresponsible people will foster an infringing product on responsible merchants like yourselves, regardless of the fact that they are selling you a lawsuit. We have no doubt here as to how you will feel about such dealings.

Our desire is that you tell us how much of this product you have had and just what you will do with it. We will appreciate it also if you will give us the exact address of

(Testimony of Benjamin L. Strauss)

the manufacturer as we want to go to him and settle this question once and for all at this time.

We are not seeking trouble, we are merely determined to insist that our trade mark and trade rights shall be respected and our policy is to do this in just as friendly and businesslike a way as possible.

These people may tell you about their trade mark on F. V. M. Co. but that has absolutely no bearing on their infringement of our trade mark 'Liquid Veneer' which is well established and has been adjudicated in Court.

Awaiting your reply, we remain,

Yours very truly,

LIQUID VENEER CORPORATION,

Martin J. Cabana,

MJC-MAF

Vice President."

WITNESS CONTINUED: I replied to that letter. This carbon copy of letter, dated April 2, 1929, addressed "Liquid Veneer Corporation, Buffalo, New York", is a carbon copy of the original letter of The May Company in reply.

Objection to the letter was made on the ground that it was "irrelevant, incompetent and immaterial; inadmissible under the pleadings and not binding in any way upon the defendant and having no relation whatsoever to the cause of action; on the further ground that anything that Mr. Strauss might have said would be hearsay." The objection was overruled, and exception taken. The letter was admitted as Plaintiff's Exhibit 3, and was read to the jury. It is as follows:

(Testimony of Benjamin L. Strauss)

"Liquid Veneer Corporation, April 2nd, 1929  
Buffalo, New York.

Attn: Martin J. Cabana.

Gentlemen:—

I am this day in receipt of your letter calling our attention to the fact that French Veneer Mnfg. Co., of Los Angeles are infringing on your rights. We are always glad to co-operate and from this day on we will discontinue the sale of French Veneer.

Yours very truly,

BLS/O ....."

MR. SHEEHAN: I ask that the letter be stricken out on the ground that it was not the original and that it was hearsay and ask for an exception.

THE COURT: Motion denied.

MR. SHEEHAN: Exception.

WITNESS CONTINUED: I received this letter dated April 18, 1929, from the Liquid Veneer Corporation. It was in reply to my letter which I had previously sent to them.

Counsel for plaintiff offered it into evidence. Counsel for defendant objected "to it all on the grounds heretofore stated; that it is irrelevant, incompetent, immaterial and inadmissible under the pleadings and that it is prior to June 2, 1932, and has no bearing whatsoever in any way, shape or manner upon any of the issues involved in this action.", and upon the further grounds that it occurred three years prior to the date of the letter set out in the complaint, which is the basis of this action, and is to a

(Testimony of Benjamin L. Strauss)

different concern, and the further ground that "This letter which they have set forth in their complaint, which is the basis of this cause of action, is June 2, 1931. Now, they cannot go behind this cause of action and claim something else way back three years before and make it up that this is anything that they can claim is due to this letter; that they certainly can't go back 20 or 30 years and claim for everything that ever happened before June 2, 1931. That is what they are claiming, that this lady was libeled or this woman was libeled by this letter."

The objection was overruled, an exception taken. (In the ensuing discussion it developed that the reference to the year 1932 was an error and that counsel meant 1931, the date of the letter set forth in the complaint.) The letter was admitted as plaintiff's Exhibit 4 and was read to the jury, and is as follows:

"The May Company,  
Broadway at Eighth,  
Los Angeles, Cal.

April 18, 1929.

Att: General Manager

Gentlemen:

This will acknowledge receipt of your Mr. B. L. Strause's letter of the 10th. We judge Mr. Strause's reverse decision to take this infringing French Veneer off sale is due to being misinformed. If we are in error and the May Company feel as Mr. Strause expressed himself for your company, we of course have no alternative but to proceed to prove our complaint in Court. Any neglect on our part to do so would jeopardize our very valuable

(Testimony of Benjamin L. Strauss)

rights now owned exclusively in Liquid Veneer trade mark and good will.

We have not commenced action against the manufacturers of this so-called French Veneer; they have jumped around so that we could not put our finger on them and the mercantile companies indicate there is no financial responsibility represented by this company. In view of this and your apparent decision now to market this infringing product we assume you will have no objection to our enjoining you with the French Veneer Company as co-defendants in this action we will start in the United States District Court to stop the manufacture and sale of this infringing substitute sold as 'French Veneer'.

It is necessary to enjoin the May Company in this action because the manufacturer is financially unable to meet damages and costs in our favor, and the May Company are responsible.

As you perhaps may know, under our laws anyone aiding or abetting by selling or offering for sale an infringing product is equally liable with the manufacturer thereof; the seller is simply assisting the manufacturer in an unlawful act, and we of course very naturally wish this action to be started against responsible people so that we may recover at the end of the action such damages as the Court would allow.

With reference to this alleged trade mark on French Veneer, Mr. Strause has been misinformed in this connection. Our records dating back to 1914 show that our attorneys investigated the matter at the patent office in Washington; that the trade mark is not on French Veneer but simply on F. V. M. Co. and has absolutely no virtue or value in opposing our trade mark Liquid Veneer.

(Testimony of Benjamin L. Strauss)

Because of our many years experience in matters of this kind and our knowledge as to the costs thereof, we would suggest that you look into this matter a little closer and don't take our word but submit it to a real patent attorney, not a commercial lawyer, but a man that makes a practice of patent law.

Because you are valued customers we want to give you every opportunity to know the facts and decide to your best interest before we proceed in this case. If it were otherwise we should not be writing this letter but our patent attorney would be writing a bill of complaint instead.

We are not seeking litigation but you will of course see we must insist upon our trade mark and common law rights being respected just as you would undoubtedly do were our positions reversed.

We await your decision in the matter and ask that you let us have it at the earliest possible date because we cannot afford to stand by and see our trade mark and trade rights disregarded; we have altogether too much at stake.

With kindest regards and assuring you our action will be made just as friendly as we know how to make it, we remain

Respectfully yours,

LIQUID VENEER CORPORATION,

Martin J. Cabana,

MJC-MAF

Vice President.

P. S. The enclosed are a few extracts from our record of this case dating back to 1914.

(Testimony of Benjamin L. Strauss)

We are registering this letter to make this legal notice."

MR. SHEEHAN: We ask that be stricken out on the ground it is not authenticated.

THE COURT: What is that?

MR. SHEEHAN: Exception.

WITNESS CONTINUES: This letter, dated April 30, 1929, addressed to the May Company, was received by us and is part of the records of the Company.

Counsel for plaintiff offers the letter into evidence. Counsel for defendant objects "to it on all the grounds heretofore stated in connection with the other correspondence offered; on the ground that it is not authenticated, and take exception to it." The Court overruled the objection, the document was admitted as plaintiff's Exhibit 5, was read to the jury, and is as follows:

"The May Company,  
Broadway at Eighth,  
Los Angeles, Cal.

April 30, 1929.

Att: Mr. B. L. Strauss,

Gentlemen:—

We have report from our representative which seems to further carry out what we have suspected right along, that the sale by your good company is merely aiding and abetting an infringing manufacturer to palm off his imitation so-called French Veneer, as and for genuine Liquid Veneer. We quote a report just received from our representative.



(Testimony of Benjamin L. Strauss)

'Miss. Kaester reports that one lady returned a bottle of French polish to The May Co., said she thought she was buying our genuine Liquid Veneer and she wanted her money back. She said it was not the goods she had been buying; said she had been using Liquid Veneer for many years.

The buyer at The May Co. is a boyhood friend of Mrs. Smuckler, the manufacturer of this so-called French Veneer.

There is a basket of French Veneer setting under one of the *tables* at The May Co. Store.'

We feel it is not your company's wish to be a party in aiding and abetting the sale of a product that is sold by unfair trade methods. Your help in this direction is of very material aid to the manufacturer and is injurious to us, as well as unfair to the public. Already you can see there had been confusion caused among your customers who bought French Veneer thinking they were getting the original Liquid Veneer which they had formerly bought from you.

With these facts in hand we feel sure you will see the unreasonableness and injustice to us and instantly take this infringing product off the market and advise us of your action.

Yours very truly,

LIQUID VENEER CORPORATION,

Martin J. Cabana,

Vice President."

(Testimony of Benjamin L. Strauss)

WITNESS CONTINUES: This letter dated April 13, 1931, addressed to the May Company, was received and is a part of the records.

Counsel for plaintiff offers the letter into evidence. Counsel for defendant objects, stating. "I wish to interpose the same objections that have heretofore been interposed to all of the letters mentioned, in particular reference to the dates on each one of the letters and on the one in question." Objection was overruled and an exception duly noted. The letter was admitted as plaintiff's Exhibit 6, was read to the jury and is as follows:

"The May Company,  
Broadway at Eighth,  
Los Angeles, Calif.

April 13, 1931.

Atten: Mr. B. L. Strauss,

Gentlemen:—

I have your favor of April 9th, stating that when you returned from your vacation you had decided to temporarily discontinue French Veneer demonstration. Do I understand by this that you intend to renew the sale of this imitation of our Liquid Veneer?

I thought this whole question had been settled definitely last year when you took the stand taken with the manufacturer of this so-called 'French Veneer', but if you have changed your mind I will appreciate your stating so, and know you will, because you are not of the kind who would state one thing and do another.

With reference to your inquiry as to why we don't stop the sale of this through the manufacturer, I thought we

(Testimony of Benjamin L. Strauss)

had made this quite clear but will now explain. The manufacturer of this product is absolutely irresponsible and had jumped from pillar to post so that we have not been able to put our finger on him, our representatives called a number of times and they even denied their own identity. In view of these circumstances, it is perfectly natural for us to take the easier way out and that is, to attack anyone who is a responsible house and able to pay, because under the law of the United States, both the trade-mark law and the law of unfair competition, the distributor, whether jobber or dealer, who sells or even offers for sale an infringing product is equally liable with the manufacturer, and your own patent attorney will confirm this to you.

With reference to a lawsuit. These are very expensive luxuries. They do not merely involve the engagement of an ordinary commercial attorney, but it is necessary to have a patent attorney, and these fellows charge \$100. a day and their expenses, some of them more, and they drag out the matter of taking testimonies which would have to be taken in Buffalo as well as in Los Angeles and which would mean that the attorneys for our respective companies would have a nice joy-ride, ours going to Los Angeles and yours coming to Buffalo taking testimonies, which is all done by deposition and then the whole matter is printed and submitted and argued in the United States District Court.

If you think that this matter is worth the May Company's time and yours to bother with, we have no alternative but to go ahead. Any suit we would commence against the May Company would be in the friendliest manner we could possibly have it, because we consider you

(Testimony of Benjamin L. Strauss)

customers and friends and the only reason we would commence an action is because we simply could not help ourselves. Our trade-mark 'Liquid Veneer' is not only well established but it has been adjudicated in the United States Court and a failure on our part now to prosecute 'French Veneer' would seriously involve us and according to our patent attorneys would invalidate our trade-mark which has cost us millions of dollars, because if we permitted 'French Veneer' to go ahead uninterrupted it would be like acquiescing to its validity and others that would begin jumping in the field and the first thing we would know would be that there would be all kinds of Veneers on the market.

The writer has gone through all of this for the past twenty-five years and knows just what he is saying.

If it is your desire to handle this infringing product with the objectionable name 'French Veneer' because you think it is good or for any other reason, why don't you have the manufacturer get on his own grounds and adopt another name. There are many good names which he could use for his polish. He never did use the word 'Veneer' until Liquid Veneer had attained prominence and he did it with the deliberate purpose of trading on our good will and name, notwithstanding anything else he may tell you to the contrary. We can prove this and prove it so conclusively that there will be no question about the matter.

(Testimony of Benjamin L. Strauss)

I hope you will accept this letter, Mr. Strauss, in the same spirit in which it is written and assure you of our very best wishes, with the request that you advise me frankly just what you decide to do in the matter, meanwhile believe me,

Yours very truly,

LIQUID VENEER CORPORATION,

Martin J. Cabana,

Vice President."

WITNESS CONTINUES: This letter, dated April 23, 1931, addressed to the May Company, was received by us and is a part of the records of the Company.

Counsel for plaintiff offers the letter into evidence. Counsel for defendant interposed "the same objection as heretofore interposed to the previous correspondence, and particularly with relation to the date of the letter." The objection was overruled, an exception was duly noted, the letter was admitted as plaintiff's Exhibit 7, was read to the jury and is as follows:

"The May Company,  
Broadway at Eighth,  
Los Angeles, Calif.

April 23, 1931.

Atten: Mr. B. L. Strauss.

Gentlemen:—

Your favor of April 18th is before the writer. First of all I want to congratulate you on your good business judgment in deciding in the manner you have.

Next I want to assure you that you are misinformed when you are told that our representative would be able

(Testimony of Benjamin L. Strauss)

to lay his hands on the manufacturer of this so-called 'French Veneer'.

We have had a trial of this for several years. The manufacturer, both the man and his wife, have dodged us and have even gone so far as to deny their own identity. I believe, Mr. Strauss, I sent you part of the record we had on these people dating back some years. We tried to buy evidence against them at their own place of business, which, as the writer recalls, was an insignificant store or residence, and we utterly failed to secure the evidence, they refused to sell their product to our representative and as the writer recalls it they denied their own identity.

Possibly now they are of a different frame of mind and would like to get a little free advertising by having us sue them. If you should encounter these good people and care to bother with them at all, explain that when we commence an action against them we will enjoin some responsible customer or distributor of their product, making a joint suit so that whatever Smuckler and his wife are unable to pay, due to financial circumstances, their distributor will make up for it at the end of a lawsuit.

I hope you will understand this situation fully now Mr. Strauss and if there is anything further you would like to know which is not clear, please feel free to write us fully on the subject.

Meanwhile, we remain, with kind regards,

Yours very truly,

LIQUID VENEER CORPORATION,

Martin J. Cabana,

Vice President."



(Testimony of Benjamin L. Strauss)

WITNESS CONTINUES: This letter, dated May 1st, 1931, addressed to the May Company, was received by us and is a part of the records of the Company.

Counsel for plaintiff offers the letter into evidence. Counsel for defendant interposed "the same objection as heretofore interposed to the previous correspondence, ESPECIALLY in reference to the date." The objection was overruled, an exception was duly noted, the letter was admitted as plaintiff's Exhibit 8, was read to the jury and is as follows:

"The May Co.,May 1, 1931.  
Broadway at Eighth,  
Los Angeles, Calif.

Atten: Mr. B. L. Strauss,  
Vice President.

Gentlemen:—

Possibly you are not aware of it that the sale of so-called 'French Veneer' is still on at one of your departments in your store, notwithstanding the demonstration has been taken off.

To the best of our knowledge we believe this is unknown to you but not to some other gentleman in your employ who is a personal friend of the manufacturer of this infringing imitation of our product.

We went through this identical matter with the great department store in Washington, Woodward & Lothrop, Washington, D. C. This great department store immediately ordered the stock out of their place while the writer was there talking to them, and we never have had the



(Testimony of Benjamin L. Strauss)

slightest doubt but what it is out to stay. We cannot help but feel that we are entitled to expect similar action on the part of your great institution, who has given its word as to the policy intended.

It is not our desire to injure anybody. If these imitators of our products want to go on doing business, why don't they adopt a trade name of their own, which would be legal, and build their business upon the quality of their product and on their own trade mark or name, as we have had to do.

We have all the evidence we need to prove that French Veneer is confusing to your customers, who in many cases believe it belongs to the Liquid Veneer Corporation and is the same as Liquid Veneer, and we know that the Court would order in our favor if we bring suit. We don't feel like bringing Smucklers in Court, because they are not responsible and while we would get an injunction against them, it would be all an expense and nothing coming in as a result of the litigation. It is for that reason when we commence an action we will enjoin one of Smuckler's customers and a responsible one and up to the present time your esteemed house is the only house we know of handling their so-called 'French Veneer'.

Will you please settle this question immediately and finally, as you will see the importance of the matter while not very great from your angle, it is exceedingly important to us?

We will await your prompt reply with interest.

Yours very truly,

LIQUID VENEER CORPORATION,

Martin J. Cabana,

Vice President."

(Testimony of Benjamin L. Strauss)

WITNESS CONTINUED: At first we temporarily suspended the sale of French Veneer. This was in 1929.

Q: (By counsel for plaintiff) 1929? Did you suspend that as the result of the letters sent to you in this case?

MR. SHEEHAN: I will object to that as calling for the witness' conclusion.

THE COURT: Well, no. It is not objectionable upon that ground I would think. He was the manager.

MR. BALTER: Geberal manager, your Honor.

THE COURT: An executive. Objection overruled.

MR. SHEEHAN: Exception.

WITNESS CONTINUED: I sent for the executive head of the buying department, known as our house furnishing goods department, trying to keep out of litigation in stopping the sale of it until we had clarified the condition and found out whether it was an infringement or not.

Objection by counsel for defendant to the testimony "as irrelevant, incompetent and immaterial as to what transpired between Mr. Strauss and the party he said he was talking to". The motion was denied and exception noted.

WITNESS CONTINUED: Referring to plaintiff's Exhibit 3, the carbon copy of letter sent by me on April 2, 1929, to the Liquid Veneer Corporation, my memory is refreshed as to the date when I ordered the discontinuance of French Veneer. We kept up the discontinuance of the sale of French Veneer until this action was brought. It was not returned at any time before 1931. The name of French Veneer was changed to "French Polish" and put into stock. At no time did we advise the Liquid Veneer Corporation after we discontinued the sale of French Veneer as to why we discontinued its sale.

(Testimony of Benjamin L. Strauss)

The witness was asked by plaintiff's attorney, "When this first took place, Mr. Strauss, this correspondence between yourself and Liquid Veneer Corporation, did you express the view of the May Company on this subject of the Liquid Veneer?" The witness answered, "We did, we asked them to prove that this was an infringement." Objection was made to this evidence on the ground that it was not the best evidence. The objection was overruled and exception was noted.

WITNESS CONTINUED: We asked or notified them that if it was a matter of litigation between themselves and the manufacturers of French Veneer that they could locate them and buy the product and find them through ourselves. This they never attempted to do. French Veneer was taken off sale in the year 1928, 1929 and the greater portion of 1930.

Q: (Plaintiff's attorney) And in 1930 it was restored as "French Polish"?

A: I can't answer that question.

Q: Anyway, French Veneer was never restored since 1929?

MR. SHEEHAN: Your Honor, I wish to object to that testimony and have it stricken out on the ground that this is all prior to the date of the writing of the letter in the complaint, which is dated June 1, 1931, or June 2, 1931.

THE COURT: Mr. Balter, suppose that had been, what would be the importance of it?

MR. BALTER: Showing the measure of damages, your Honor, now. This product French Veneer was destroyed as a business of the plaintiff on a certain date.

(Testimony of Benjamin L. Strauss)

She subsequently, maybe two or three years later, had to start all over again and try to sell a new product. We want to show the extent of the damage.

THE COURT: When do you conceive that its use was destroyed?

MR. BALTER: As far as the May Company was concerned, their letter of April the 2nd, 1929, established the fact that 'We are always glad to cooperate and from this day on we will discontinue the sale of French Veneer'.

THE COURT: Is that the witness' statement that it was discontinued then?

MR. BALTER: Yes. I asked the witness that.

THE COURT: In 1929?

MR. BALTER: And for a period of several years the plaintiff had no product with May Company, and then when she did put a product on, at the suggestion of Mr. Strauss, because of reasons which he can explain, she put on a new product with a new name, meeting new sales resistance. The jury has a right to consider these elements in assessing the damages to be awarded.

MR. SHEEHAN: I object to it all, your Honor, because, evidently, we have got to be apprised of something here.

THE COURT: Because of what? I am not following you.

MR. SHEEHAN: They claim that this letter that is the basis of this damage is dated June 1st—

MR. BALTER: 2nd.

MR. SHEEHAN: —2nd, 1931. Obviously, anything that transpired previously to that has no bearing on the letter because the letter was not in existence.

(Testimony of Benjamin L. Strauss)

THE COURT: LET ME see the file.

The Court then read the allegations of the complaint and stated: "And the allegation is of general damage to the business of plaintiff. Why, then, is not this evidence admissible?"

MR. SHEEHAN: Because, your Honor, this is three years prior to the time of writing the letter.

THE COURT: But the allegation in the complaint is that as a result of these various letters not confirming them to any one.

MR. SHEEHAN: But we are not apprised of anything else we are charged to libel except this thing that they put in here.

THE COURT: I think the allegation of the complaint that I have just read is clear and distinct to the effect that letters were written, is it not? Certainly it is, because I just read the allegations. Now, in the absence of a motion for particulars or something of that sort, I think the letters are admissible. They are already admitted, at any rate, and it is a matter for the jury to pass upon, to say whether the plaintiff suffered any damage, of course, and whether, if she did suffer damage, that was attributable or reasonably the result of the letters.

Discussion followed in which counsel for defendant stated that the claimed libel arising in this case arose out of a specific letter which was dated June 2, 1931, and that previous letters are all irrelevant, to which counsel for plaintiff stated that defendant has not asked for a Bill of Particulars and that for the purpose of showing damage and to show the course of conduct of the defendant over a period of years his field was very broad. The Court read over Paragraph IX of the complaint and stated:

(Testimony of Benjamin L. Strauss)

THE COURT: Unless your letter is the cause of your damage these letters then, while they are relevant and material as showing intent, are not an element of the damage.

MR. BALTER: May I refer your Honor's attention to paragraph VI: 'That for a long time prior to this date, the defendant has continuously and systematically and for the purpose of injuring the reputation and the business conducted by this plaintiff, caused letters to be mailed to various customers'—

THE COURT: You do not need to do that. I have already called your attention to that.

MR. BALTER: We are reading from two separate paragraphs. You are reading from the paragraph charging the damages. In other words, we have charged a course of conduct libelous to this plaintiff and we have set out one representative letter.

THE COURT: Wait a minute. My view is you may set out a million charges of libel but unless you attribute your damage to them you cannot claim damage because of them. You can show motive and all that, but in your paragraph IX it is a question whether you have not confined yourself to the one letter of 1931.

MR. BALTER: Well, clearly we have not, your Honor. 'That the statements contained in the communications addressed by the defendant, Liquid Veneer Corporation.' Now, if you refer back to paragraph VI we say 'Letters'. We do not say 'Letter'.

THE COURT: Follow that along: 'That the statements contained in the communications addressed by the defendant,\*\*\*\* were false, malicious and untrue, and



(Testimony of Benjamin L. Strauss)

were made only for the purpose of destroying the good name and reputation and business of this plaintiff.'

MR. BALTER: That is right.

THE COURT: 'and that by reason of the said false, malicious and defamatory publication aforesaid', singular. Now, if that is not broad enough to include all of those, because, remember that this is the basis of your damage.

MR. BALTER: Yes, your Honor.

THE COURT: And if it is not broad enough to include those previous ones you can't claim damage on them.

MR. BALTER: I think it is broad enough, your Honor. We are setting out a system by the defendant.

THE COURT: In the absence of a specific objection heretofore made as to what was included, or an analysis of this complaint, I would feel compelled to say that the basis of damage may reasonably be held to include all of the previous letters. Undoubtedly, I think that was the intention.

MR. BALTER: That was the intention.

THE COURT: Overruled. Go on.

MR. BALTER: And no bill of particulars was ever asked for.

MR. SHEEHAN: I will take exception to the Court's statement.

THE COURT: Yes.

MR. BALTER: Mr. Reporter will you be good enough to read the last question which I asked Mr. Strauss?

MR. SHEEHAN: Your Honor, in that connection I would like to call your Honor's attention to this: You see we are not charged with anything else except this.

THE COURT: Do you want to argue this matter again? The Court has ruled.



(Testimony of Benjamin L. Strauss)

MR. SHEEHAN: I am stating a fact, your Honor, because it is a serious matter for us.

THE COURT: Proceed.

WITNESS CONTINUED: This is a bottle of "Liquid Veneer", defendant's product. (Admitted as plaintiff's Exhibit 9.) This is a carton of Liquid Veneer, defendant's product. (Admitted as plaintiff's Exhibit 10.) This is a sample of the product of the plaintiff, "French Veneer" sold at the May Company up to 1928. (Admitted as plaintiff's Exhibit 11.) This is a carton and label of French Veneer, plaintiff's product. (Admitted as plaintiff's Exhibit 12.)

Q: (By plaintiff's Attorney) In your experience there at the May Company over a period of 12 years, when you knew the plaintiff during all that time, were any complaints ever made to you that the public was being confused as to buying one product or the other?

MR. SHEEHAN: I will object to that as irrelevant, incompetent and immaterial.

MR. BALTER: May I have your answer?

A: No, sir.

THE COURT: A moment, please.

MR. BALTER: I am sorry, your Honor. I did not hear that.

THE COURT: Strike out the answer.

After argument the Court overruled the objection, an exception was taken to the answer of the witness to strike out and it was restored.

Q: (plaintiff's attorney) In your experience over a period of 12 years you have known Mrs. Smuckler here and you have been merchandise manager of May Com-

(Testimony of Benjamin L. Strauss)

pany, have you ever had any complaint to you from any customers or any buyers or managers of departments that there has been any confusion in the minds of the public between these two products?

The following objection was made:

"Just a minute before he answers that. I object to that on the ground it is irrelevant, incompetent and immaterial; that the question is leading the witness; that it is calling for the witness' conclusion; and that the date of the letter in which the libel is charged in this complaint is June 2, 1931, and this man is asking over a period of 12 years now from some date or other."

Objection was overruled and exception was noted, and the witness answered, "No sir."

WITNESS CONTINUED: In the 12 years I have known Mrs. Smuckler I have always known where she could be reached, she has not eluded anybody and I have never hesitated to do business with her as a business risk or business credit.

Upon

#### CROSS-EXAMINATION

the WITNESS TESTIFIED: My relations with Mrs. Smuckler have only been as a tradesman, I do not know her outside of business and belong to no clubs or organizations to which she belongs. French Veneer was in stock up to the year 1928. During the years 1928, 1929 and part of 1930 it was excluded from sale at the May Company and in 1930 there was substituted for it French Polish. During this time she was in business. I, my-

(Testimony of Benjamin L. Strauss)

self, discontinued the sale of her product knowing it was available for sale and did so of my own volition, and we are now selling her product, French Polish. I am the one who suggested to Mrs. Smuckler that she change the name of her product from French Veneer to French Polish. I had no interest in her business but was co-operating with her in a friendly way.

On

### REDIRECT EXAMINATION

the WITNESS TESTIFIED: We discontinued the sale of French Veneer for the reason that "we were threatened with litigation".

Q: (by plaintiff's attorney) And why did you suggest to Mrs. Smuckler several years later that you felt that she should restore French Polish?

MR. SHEEHAN: I object to that as irrelevant, incompetent, immaterial and not binding on this defendant.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

A: The demand for her polish was great. We had built up a trade and had a customer following. We got calls continuously for her product, and I suggested that she manufacture it under another name.

Q: BY THE COURT: Did I understand you to say that there was a demand for her French Veneer?

A: No, for her—

Q: French Polish?

A. There was a demand for her French Veneer.

Q. There was a demand for her French Veneer?

A: Yes, sir.

(Testimony of Benjamin L. Strauss)

Q: Even at the time you quit using it?

A: Yes, sir.

THE COURT: Yes.

Q: MR. BALTER: And that is why, after it was off the shelves for a year or two, you suggested she restore the merchandise under another name?

A: Yes, sir.

MR. SHEEHAN: I will object to that as leading the witness and calling for the witness' conclusion.

THE COURT: Well, it is leading but it is in redirect, rather a summation and is allowable under such circumstances. I do not think it is a conclusion.

MR. SHEEHAN: Exception.

Q: BY MR. BALTER: Did you ever sell French Veneer in other stores of May Company besides the Los Angeles store?

A: No, sir.

Q: Did you contemplate placing this product in other stores of the May Company?

MR. SHEEHAN: I will object to that as speculative and not binding on this defendant, incompetent, irrelevant and immaterial what he speculated about.

MR. BALTER: Merchandise manager, your Honor.

THE COURT: It is within the legitimate range of possibility, I think. Overruled.

MR. SHEEHAN: Exception.

A: Yes, sir.

Q: BY MR. BALTER: And did you discuss that possibility with Mrs Smuckler at some time?

A: Yes, sir.

MR. SHEEHAN: I will object to that as irrelevant, incompetent, immaterial and not binding on this defendant.

(Testimony of Benjamin L. Strauss)

THE COURT: Overruled.

MR. SHEEHAN: As to whatever conversation he had with Mrs. Smuckler.

Q: BY MR. BALTER: And why did you not place this product in other stores of May Company?

MR. SHEEHAN: I will object to that as irrelevant, incompetent, immaterial, and calling for the conclusion of the witness, not binding on this defendant.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

A: Not wanting to buy litigation.

Q: BY MR. BALTER: In other words, your decision had no relationship to the merit of the product, did it?

A: No, sir.

MR. SHEEHAN: I will object to that and ask the answer be stricken out. They did not give me a chance, your Honor. They are trying to get this in the record.

THE COURT: All right. That is true.

THE WITNESS: I am sorry.

MR. BALTER: All right, I will withdraw the question and reframe it.

Q: Did your decision not to place French Veneer in all of the other stores of May Company throughout the United States have any relationship to the quality or value of the product for sales purposes?

MR. SHEEHAN: I object to that as irrelevant, incompetent and immaterial; inadmissible under the pleadings and not binding on this defendant.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

A: No, sir.

(Testimony of Benjamin L. Strauss)

MR. SHEEHAN: Exception.

Q: Assuming that, from your experience as a merchandiser for 30 years, and your intimate knowledge of this product and its competitive quality compared with other products of the same type, and your intimate personal knowledge of the plaintiff in a business relationship in your experience with her in the May Company, and assuming that there were no harassment of her conduct, and assuming that no threatening letters were sent to her customers by the defendant, would you say that the plaintiff could have extended her business substantially beyond the bounds that you knew it? I have eliminated that phase of it, your Honor.

Objection was made on the ground it was "irrelevant, incompetent, immaterial and not proper, and that the witness is not properly qualified, that there is no evidence on which to base any such hypothetical question and on the ground that it is opinion evidence calling for the witness' conclusion, and is speculative."

The objection was overruled an exception was noted, the witness testified that she could have increased her business very materially because her product was genuine and she had created a demand for it and had a following after it was sold.

On

RECROSS EXAMINATION,

WITNESS TESTIFIED:

Referring to plaintiff's Exhibit 4 and where it says, "we judge Mr. Strause's reverse decision to take this infringing French Veneer off sale is due to being misin-

(Testimony of Benjamin L. Strauss)

formed", I do not recall that I wrote and reversed my decision. I would have to refer to my letter. I cannot elaborate on that and could not answer without the memorandum. Referring to plaintiff's Exhibit 6, the letter dated April 13, 1931, where it says, "I have your favor of April 9th, stating that when you returned from your vacation you had decided to temporarily discontinue French Veneer demonstration." my recollection is not refreshed as to whether or not the French Veneer demonstration was in my store up to the time when I returned from my vacation, nor when I returned from my vacation. In 1929, 1930 and 1931 the demonstration of French Veneer in our store was on the fourth floor in about the center of the house furnishing goods section, about 75 to 100 feet from the place of the Liquid Veneer demonstration. I do not know in what stock rooms the stock of French Veneer or French Polish was kept, but during the times mentioned no stock was kept. This I know through the want slips system we have.

MR. BALTER: Just one question. Since Mr. Sheehan does not see fit to introduce this letter, I shall ask leave to introduce it. He brought it up himself, your Honor.

THE COURT: Yes, the letter is admissible.

On

## REDIRECT EXAMINATION

WITNESS TESTIFIED:

This copy of letter dated April 10, 1929, is a copy of the original letter I sent to Liquid Veneer Corporation.

Over objection of defendant that it was irrelevant, incompetent, immaterial, hearsay, not the best evidence and



(Testimony of Benjamin L. Strauss)

inadmissible under the pleadings, the overruling of the objection and the noting of an exception, the letter was admitted as plaintiff's Exhibit 13, was read to the jury, and is as follows:

"Liquid Veneer Company  
Buffalo, New York,

April 10th, 1929.

Attention: Mr. Martin J. Cabana

Gentlemen:—

I wrote you on the 2nd inst. in reference to the French Veneer Mnfg. Co. Since that time Mrs. Lena G. Smuckler and her son have called on me and laid their case before me.

I think that taking this merchandise off sale would be an injustice and personally cannot see where their item is an infringement on yours. The word "Veneer" to my way of thinking is a word that no one has a right to lay claim on as it was used many years before either you or she manufactured your product.

Their Trade Mark was registered in the United States Patent Office on May 5th, 1914. It seems to me that if this was an infringement that this name could not have been registered in the Patent Office. You claim in your letter that you have been unable to locate the owners of French Veneer. Their name has been in the Los Angeles Telephone Book for the past 13 or 14 years. You could always have gotten their address through ourselves or

(Testimony of Benjamin L. Strauss)

from their billing head, had you so desired. Mrs. Smuttler's son, Elijah M. Smuttler is an attorney at law located at 920 Chester Williams Building, Los Angeles, California.

We are going to change our mind and sell French Veneer until such time as you can show us that you have a restraint order restraining Mrs. Smuttler from selling her product.

Yours very truly,

BLS/O

-----"

Q. (by Mr. Balter) Did you ever receive a court order from the Liquid Veneer Corporation restraining you from selling either French Polish or French Veneer?

A. No, sir.

Q. You haven't yet, have you?

A. No, sir.

Q. In spite of all these letters written you?

A. No, sir.

On

## RECROSS EXAMINATION

### WITNESS TESTIFIED:

Where I state in the letter, "We are going to change our mind and sell French Veneer until such time as you can show us that you have a Court Order restraining Mrs. Smuttler from selling her product" I expressed my opinion of her product and what I intended to do about it.

(Testimony of William E. Max)

WILLIAM E. MAX,

witness for the plaintiff, was sworn and testified, on

DIRECT EXAMINATION:

I am and have been for 12 years buyer of house furnishings at the May Company, in charge of that department. I have known Mrs. Smuckler about 20 years, first meeting her in approximately 1915, at Hamburger's Department Store, where she was demonstrating French Veneer, and which she sold at Hamburger's and the May Company, as I recall it, to the first part of 1929. After we received the letter dated March 27, 1929, plaintiff's Exhibit 2, we discontinued the sale of French Veneer.

Q. BY MR. BALTER: For how long a period of time, do you recall, was the product French Veneer polish taken off the shelves of May Company?

MR. SHEEHAN: I will object to that, your Honor, on the grounds that any transactions with the May Company are absolutely incompetent, irrelevant, and immaterial in this action because the letter which is claimed to be the basis of a libel here is one that is addressed to Young's Market on Eighth Street, under date of June 2, 1931; and on the further ground that any transactions with the May Company or with any other company prior to that date last mentioned would have no bearing upon any of the allegations in the complaint in this action; would be irrelevant, incompetent and immaterial.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

WITNESS CONTINUED: It was taken off sale on receipt of the letter and kept off until 1930, at which time we substituted the French Polish for French Veneer.

(Testimony of William E. Max)

Q: Now, during this period of time between the very early part of 1929 until some time in 1930 was there a demand for French Veneer?

MR. SHEEHAN: I object to that as calling for the witness' conclusion and on all of the grounds previously stated, your Honor.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

WITNESS CONTINUED: There was a continued demand for the product. I suggested that she change the name because of the objections to the words "Liquid Veneer" as we wanted to sell it and because of the demand. I don't want to be considered or thought of as an expert on polishes but from a sales standpoint my girls were instructed to tell the customers if they wanted something for a polishing surface to suggest Liquid Veneer, or if they had dark furniture or furniture that needed scratch covering to suggest French Polish or French Veneer.

Q: BY MR. BALTER: Did you ever receive any complaints from anybody that any such palming off of products was taking place?

MR. SHEEHAN: I object to that on the same ground, and particularly in reference to counsel's statement in the question that is over a period of 20 years.

THE COURT: As relating to the witness' experience in selling to the public, I think it is material and relevant. Objection overruled.

MR. SHEEHAN: Exception.

THE COURT: You may answer it.

(Testimony of William E. Max)

MR. BALTER: Will you answer that question?

A: I might answer it in this way: That it would not be there if there had of been --

THE COURT: The question related to the public reaction. Did you hear any complaint from the public?

A: None that we know of.

THE COURT: No. All right.

WITNESS CONTINUES: During my acquaintance with Mrs. Smuckler I knew where she could be reached at all times.

Upon

#### EXAMINATION

by the Court, the WITNESS TESTIFIED:

We started selling French Veneer because Mrs. Smuckler called on me to show me the product about 1915, and we continued to sell it until 1929. During this time we knew where we could go and get the product, we had her address and mailed orders to it. She was in the 'phone book and City Directory. We could communicate with her the same as any other manufacturer of products sold in our store.

On

#### CROSS EXAMINATION

the WITNESS TESTIFIED:

I am no relative of Mrs. Smuckler and have only had business relations. I cannot give you the address of Mrs. Smuckler on May 10, 1932, or say where she lived on February 2, 1935, except by referring to my records. I

(Testimony of William E. Max)

have no recollection whatsoever of where she lived during these periods except by referring to the records. I have known Liquid Veneer Company for a long period of time and that it had a trade mark on the words "Liquid Veneer" was drawn to my attention. Miss Kaster was a demonstrator for the Company and her demonstrations were held on the fourth floor. During this time French Veneer also had demonstrations. I would make the arrangements with Mrs. Smuckler for her demonstrations. She had none in 1929, or 1930, but had one in 1931 because we started selling the merchandise at that time. During 1929, 1930 and 1931, we did not to my knowledge carry any French Veneer in stock in the Paint Department or stock room.

The witness was asked: "Where is the stock room in the May Company?" when discussion took place between the Court and counsel to ask the purpose of such examination and counsel for defendant stated he wanted to prove that the witness and Mr. Strauss were mistaken in the conclusion that there was no French Veneer in the May Company during 1929, 1930 and 1931. The Court asking: "Suppose that it was there or was not there, what relevancy or materiality has it?" Counsel stated, "Well that is the contention I have been maintaining all along, your Honor, that it has no relevancy. But in so much as your Honor has, I believe on those points consistently ruled against me on the admission of these letters and in the admission of this testimony, I thought I would do the best I could to correct it."

THE COURT: The letters and all are admissible as to the case of the defendant, as to the motive of the defendant.

(Testimony of William P. Waddington)

MR. SHEEHAN: Are you limiting it to that, your Honor, only?

THE COURT: No, I am not limiting it to that because the question of damages is involved. I think that your examination is entirely collateral and on an entirely irrelevant matter as to the details of the location of the stock room, for instance. Sustained.

MR. BALTER: I will make the objection, your Honor.

WITNESS CONTINUED: French Veneer was taken off display and out of stock when we received that letter. When the product was in the store it was on display in two places. We have a stock room on the sixth floor and a stock room on the fourth. In most cases fresh merchandise is kept on the sixth floor, excepting for sale and for sale it was put into the paint department as well as in the demonstration.

WILLIAM P. WADDINGTON,

witness for plaintiff, was duly sworn, and testified on

DIRECT EXAMINATION,

I was employed as buyer in the household department of Young's Market Company, the main store Seventh and Union, in 1928, and stayed with them until early in November 1931, as I recall it, and have been merchandising for about forty years. Liquid Veneer was in the department when I went there. French Veneer was put in, as near as I can recall, while I was there in 1928.

The witness was shown a copy of plaintiff's Exhibit 1 and asked if, to his recollection, the letter was received



(Testimony of William P. Waddington)

by him at Young's Market when he was there. The following discussion ensued.

MR. SHEEHAN: Your Honor, I wish to object to that question on the ground that it calls for the conclusion of the witness and that it is inadmissible under the pleadings. There is no allegation in the complaint whatsoever that the letter was ever received by the Young's Market.

THE COURT: Let me have the complaint.

MR. BALTER: We allege it was written to them, your Honor. It is presumed a letter written is received.

THE COURT: The allegation is that the defendant published and caused to be published a letter addressed to Young's Market Company, which letter reads as follows:

MR. BALTER: A presumption of law arises that the letter was received in the due course.

THE COURT: Wait a moment, please.

A: As near as I can recall, this --

THE COURT: Just a minute.

THE WITNESS: Pardon me.

THE COURT: Now, I want to call counsel's attention to the denial of that appearing on page 3 of the answer. '(b) That it denies that at any time, or at all, in furtherance of the plan and/or scheme to injure plaintiff's good name and/or reputation it wrote or caused to be written and/or mailed the letter set forth in said paragraph VI.' Do you think that is a denial, sir?

MR. SHEEHAN: Well, I would say it would be a denial in the terms of the allegations of the complaint. The allegations of the complaint, of course, your Honor, will see, are so framed that it would be very difficult to deny them categorically in any way.

(Testimony of William P. Waddington)

THE COURT: I am not talking about that feature of it. I have just read to you the allegation of the complaint. Now you know that that is not a denial, don't you; that for the purpose of injuring the plaintiff, that is merely a denial that you wrote the letter for the purpose of injuring the plaintiff, but is an admission that you wrote the letter.

MR. SHEEHAN: Well, your Honor, I do not believe I am in any position to deny that this letter was written. Frankly, I do not really know.

MR. BALTER: You said that yesterday, Mr. Sheehan.

THE COURT: That is just exactly what I wanted. Your position, then, is that you will observe the rule that certainly prevails in this Court and in all business or trials of cases that involve business, and when there is an open and evident fact that you will not deny it. This Court and trial has been delayed since the beginning by technical—and I will not describe them otherwise—questioning as to whether this letter was written. Yesterday I had not examined the pleadings but here is a direct admission—not a direct admission, but a failure to deny, I take it. Now, if this letter was written let us have that admitted, and I do not want to hear any more of it during this trial. Proceed.

MR. SHEEHAN: May I explain myself, your Honor?

THE COURT: Yes, sir, you may, but don't make it too long now.

MR. SHEEHAN: Well, it has never been my position that I denied this letter, never has. I did not draw that answer. Other counsel drew it and I understood the answer did admit it.

(Testimony of William P. Waddington)

THE COURT: Do not trouble the Court with that. It is the defendant's answer and you do not need to introduce such suggestions.

MR. SHEEHAN: The only thing, your Honor, that I might state is that I did not have the copy of it and the original was not produced. I do not know what that means, but as to my own knowledge about anything, I have none, and I do not deny what apparently seems to be an obvious composition of this defendant.

THE COURT: I will remember that you made the statement yesterday of your own knowledge that the company did not have a copy of that letter.

MR. SHEEHAN: Your Honor, that I did not have it.

THE COURT: The Court certainly took that as a denial that the letter had been written and your whole conduct was a denial that the letter had been written.

MR. SHEEHAN: I am sorry, your Honor, if I have created that impression. I did not have a copy of the letter.

THE COURT: All right.

MR. SHEEHAN: When they did not produce the original I thought it was at least something as to the inquiry.

THE COURT: Proceed.

Q: BY MR. Balter: When you received this letter was it shown to you by Mr. Young?

A: Yes.

Q: And you read it, didn't you?

A: I read it.

Q: And you acted upon it?

A: Jointly.

(Testimony of William P. Waddington)

MR. SHEEHAN: Just at this point, your Honor, I wish to—and I think I have got to do it in protection of my client's rights—I wish to take an exception to your Honor's remarks in the presence of the jury on that subject.

THE COURT: Very well.

WITNESS CONTINUES: Upon receipt of the letter we immediately took the merchandise out of stock, showed Mrs. Smuckler the letter, and Mr. Young put the letter away in his private files and he has been incapacitated quite a while since. I know that an effort was made to find that particular letter. I have heretofore seen this letter dated September 16, 1931, addressed to Young's Market and signed, Liquid Veneer Corporation, Martin J. Cabana, Vice President.

It was offered into evidence by plaintiff, was objected to as "irrelevant, incompetent, immaterial and inadmissible under the pleadings", objection overruled and exception noted, admitted as plaintiff's Exhibit 14, was read to the jury and reads as follows:

"Gentlemen:—

We can't wait longer for your reply to our legal notice and friendly explanation of our position concerning your selling and offering for sale an infringing product under the name of 'French Veneer'.

Since writing you, the package of so-called 'French Veneer' purchased at your establishment has arrived and is now on the writer's desk, awaiting the attention of our attorneys.

(Testimony of William P. Waddington)

We should be very sorry, indeed, if you made it necessary for us to pass your name to our attorneys together with the evidence, on account of your failure to agree, and advise us at once that you will respect our legal and trade rights.

We are willing to release you at this time from all claims for past infringements and violation of our rights, if you will instantly stop selling, or offering for sale, this infringing product, in violation of our legal and trade rights. In doing this, we consider that we are doing you a distinct business favor and courtesy.

We are not in business to sue people, but to serve them, providing they are willing to respect our legal rights just as we would respect others were our positions reversed.

Our reason why we are anxious to have you understand this situation is that when attorneys get hold of a thing of this kind, they make it their business to start a suit in United States Courts and heavy costs necessarily follow, which costs you will be obliged to pay, besides paying your own attorney fees.

We will await your prompt response. Your silence to our friendly offer will leave us with no alternative but to place the whole matter in the hands of the attorneys.

Yours very truly,

LIQUID VENEER CORPORATION,

Martin J. Cabana,

Vice President."

(Testimony of William P. Waddington)

WITNESS CONTINUED: I have not heretofore seen this letter, dated October 1, 1931, addressed to Young's Market, on the stationery of Liquid Veneer Corporation. I never saw that letter because just at that time I was in another department and I was not very active in the household department. The stamp on the back is that of Young's Market.

MR. BALTER: Well, that is sufficient. I offer this letter in evidence, your Honor, as a letter written to Young's Market Company, on October the 1st, 1931.

THE COURT: Very well.

THE CLERK: Plaintiff's Exhibit 15.

MR. SHEEHAN: The same objections and exception.

THE COURT: Yes, overruled.

The letter was read to the jury and is as follows:

"Dear Mr. Young:—

Your favor of September 22nd is before us. We appreciate fully that you have been erroneously influenced in your discussion with Mrs. Smuckler. We have noticed a desire on the part of these infringers to trouble us in the hope that we will buy out their business.

They know perfectly well that they have, up to this time, apparently found it difficult to make progress satisfactory to themselves. In these days it is difficult to make profits in most all lines but it always has been much more difficult for any one to make profit while infringing on another's rights in the trade.

With reference to your suggestion that the least we could do is to establish our rights through the Courts would say that that is just what we have been trying to

(Testimony of William P. Waddington)

do for a number of years. These folks Smucklers have denied their identity, moved from place to place and made it very difficult for us to pin them down and even obtain evidence against their unlawful practice. In the meantime we found that they were not doing much business but apparently succeeded in interesting your house and one other house in your City.

We decided the way to handle this case is to secure legal evidence against any responsible trader such as your house and start our action against the trader, possibly in joining the manufacturer at the same time. You will understand that our attorney's reason for this is that the Smucklers are not financially responsible, and if we have got to go into Court and litigate the matter, we want to do it with some one who is financially responsible and who can foot the bill of damages. We have been seeking such an opportunity, but the only responsible house outside of your own whom we secured evidence against has discontinued the sale of the infringing so-called 'French Veneer' and we have no alternative but commence our action against your esteemed house if you insist upon aiding and abetting this infringer.

One of our inspectors just a few days ago reported inability to purchase 'French Veneer' at your store. We have already purchased a package from you which we have here as evidence. We now want to know if you have discontinued selling this line or if you intend to continue its sale. We know that you will be frank in



(Testimony of William P. Waddington)

stating your position because you are business people and undoubtedly recognize the necessity of making your definite decision. Please do not misunderstand—we are not arrogant or dictatorial. We are simply seeking to maintain our legal and trade rights just as you would do were our positions reversed.

We will await your prompt response and assure you we would much rather do you a business favor than otherwise.

Yours very truly,

LIQUID VENEER CORPORATION,  
Martin J. Cabana,

MJC:BK

Vice President.

P. S. With reference to buying out this infringer. You can state to them for us if you care to that we will spend thousands in defense of our legal and trade rights but would never pay a five cent piece tribute to them or anyone else.

M. J. C.”

WITNESS CONTINUED: The stamp on the back of this letter, dated October 16, 1931, is the receiving stamp of Young's Market Company.

Counsel for defendant objects on the same ground as interposed for the previous letters, the objection is overruled, an exception noted, the letter introduced as plaintiff's Exhibit 16, was read to the jury, and is as follows:

(Testimony of William P. Waddington)

“Young’s Market Co.,  
1610 West 7th St.,  
Los Angeles, Cal.

Gentlemen:—

Your favor of the 6th is noted fully. There is no further adjustment of this matter to be made so far as our relations with the Smucklers is concerned, or anyone else for that matter, (outside the United States District Courts). We will appreciate your making that clear to the Smucklers, if you care to.

You expressed the belief that the Smucklers are not infringers, yet ask ‘in what way French Veneer is an infringement’. In reply would say any reputable patent attorney will tell you that French Veneer is a flagrant infringement of our trade-mark and trade-name ‘Liquid Veneer’ by using a part of our name. Aside from our legal rights under the trade-mark laws they are guilty of unfair competition, which comes under another law entirely.

They are guilty on two counts and liable for damages for all they have sold in the past, and you, Young’s Market Co. are equally guilty with them as a distributor.

Now, if that be the case, and you wish to continue the sale of French Veneer, we would have no alternative but to commence an action against you in United States District Courts. We just can’t help doing so. Our very business would be at stake were we to consent to your infringing and do nothing to protect our trade-name. It might be construed equivalent to abandonment.

You state that you have not sold any of this product since our first letter and will discontinue its sale until

(Testimony of William P. Waddington)

the matter can be adjusted. We are not clear as to just what you mean by this and will appreciate your making yourself clear to us, because we are stating facts to you just as they are and without any other than the most friendly feelings.

We are going to commence an action against any responsible house who handles this infringing product, We will quite easily have our rights adjusted in Court, because they have already been adjudicated in the United States District Court in Cincinnati, Ohio, in which case the infringing article was called '20th Century Veneer Gloss', and inasmuch as this precedent is established we might not have such a lengthy drawn out case in this instance as we had formerly.

There is no need of your going any further than to consult your own patent attorney to verify our statements. If he wishes, we will be glad to submit Court decree in the matter of '20th Century Veneer Gloss'.

We are trying to save you from difficulty and expenditures. If we must go into Court to settle the matter we are going to demand damages not only for every bottle sold by your Company (which you alone are responsible to us for) but for every bottle manufactured and sold by Smuckler. This is a perfectly natural thing for us to do and which you would do were your position reversed.

Will you please let us have your reply promptly, so that we may know just what procedure we are to take? With every good wish, we remain, meanwhile,

Yours very truly,

LIQUID VENEER CORPORATION,  
Martin J. Cabana,

MJC:BK

Vice President."

(Testimony of William P. Waddington)

The Court, stating that he is a bit doubtful about the competency of the letters, ruled that this letter "is not relevant and I want that letter stricken out for the present". It was then offered by attorney for the plaintiff for identification, which was permitted.

### EXAMINATION

OF WITNESS CONTINUED:

Q: BY MR. BALTER: Mr. Waddington, when did you take off of the shelves of the Young's Company the product French Veneer?

A: I could not give you the exact date that it was taken off. It was following the receipt of this letter, the first letter introduced.

Q: The first letter that I read? And why did you take it off the shelves?

A: Because of the threat involved in the letter.

MR. SHEEHAN: I object to that and ask that it be stricken out.

THE COURT: Motion denied.

MR. SHEEHAN: Exception.

A: When we took it out of stock upon receipt of that threatening letter it never was put back in, to my knowledge, at least from the time I was there until the end of 1931 and from June 2, 1931 no merchandise of the plaintiff at all was on sale or exhibited at Young's.

Over objection overruled and exception noticed, the witness testified that the product sold exceedingly well. Counsel for plaintiff asked if the witness considered it a good product, if it sold as well as or better than defendant's polish and if there was a larger demand for it than for Liquid Veneer, to which questions objections of the de-

(Testimony of William P. Waddington)

fendant were sustained, the Court stating, "it seems to me that is not at all important as to the relative appeal to the trade of the two products", whereupon,

MR. BALTER: These people claim to have a trade-marked product for 30 years, and here comes a product that outsells them three to one.

MR. SHEEHAN: I object to counsel's statement.

MR. BALTER: If the evidence so shows.

MR. SHEEHAN: I ask the Court to tell the jury to disregard it.

THE COURT: Your statement is improper.

MR. BALTER: I will withdraw it, your Honor.

THE COURT: It should be stricken. Counsel withdraws it. Go ahead.

Q. BY MR. BALTER: As a merchandising man with experience over 40 years, I think you said, Mr. Waddington, and with your knowledge of this product and with your knowledge of how it sold at Young's in comparison with so-called well-established products, would you say that, assuming there were no threats by competitors against the product and it were allowed to develop normally, would you say that the plaintiff's product could be expanded into a large profitable business?

MR. SHEEHAN: Now, don't answer that until I have a chance. I object to that as calling for the witness' conclusion, also his opinion, asking for an opinion of the witness and speculative, and that there is no basis for such a hypothetical question being put to this witness.

THE COURT: I think if the element of threats, etc., perhaps is eliminated, the witness may properly testify from a commercial standpoint as to the prospects of the

(Testimony of William P. Waddington)

probable course of such a product. I think that is entirely proper.

MR. SHEEHAN: Well, your Honor, if a man like that could testify with a great degree of certainty it certainly would be a wonderful commercial instinct to have. He would be a valuable man in any business in the world if he could so predict that. I think it is so highly speculative that it is simply incompetent.

THE COURT: I base it on the fact that here is a witness who has been in commercial lines and in this particular line, cultivating public tastes, no doubt, for a good many years and, therefore, ought to be a judge of it.

MR. BALTER: That is true your Honor.

THE COURT: With that exception, eliminating that part of it, the question will be answered.

MR. BALTER: May I consider you have asked the question, your Honor; you have reframed it better than I could, and require him to answer the question?

MR. SHEEHAN: Exception.

A: Maybe I could answer it best this way: During my experience in marketing polishes of this sort I have never at any time found anything that came onto the market as quickly as this French Veneer.

MR. SHEEHAN: Your Honor, I think I will have to object to that, as to this man making a dissertation on French Veneer and expounding its qualities or its sales ability or anything in connection with the Young's Market as promoting this particular product. I think it is en-

(Testimony of William P. Waddington)

tirely outside the issues of this lawsuit, if there are any issues in it.

THE COURT: Let's see; you are objecting? Was there an objection?

MR. SHEEHAN: I am objecting to the witness' dissertation and explanations.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

THE COURT: Go on, Mr. Waddington.

MR. SHEEHAN: And to his opinions.

A: (Continuing): And over, as I say, such a short period of time; and at the time we received this threatening letter our sales on French Veneer were far out-selling any other polish that we had in the house, and it just was like cutting it off with a knife; it stopped all at once as a result of this letter.

MR. SHEEHAN: Now, I object to that and ask that it all be stricken out.

THE COURT: Motion denied.

MR. SHEEHAN: The witness characterizing as to how it affected him on his business.

THE COURT: Further questions?

MR. SHEEHAN: Exception.

WITNESS CONTINUED: After a demonstration we liked and purchased Mrs. Smuckler's polish and during the period we marketed it we had no difficulty in locating her by 'phone or mail when we needed polish we would either send a formal order to her or call her on the 'phone and the polish was promptly delivered.



(Testimony of William P. Waddington)

ON

## CROSS-EXAMINATION

### THE WITNESS TESTIFIED:

My statement is intended to be that we took French Veneer off sale after receipt of this letter dated June 2, 1931. I am not prepared to say when the merchandise was taken out of the house. When plaintiff's Exhibit 14, letter of September 16, 1931, was received I was busy reorganizing another department at the time and I know nothing about that purchase at all. The only knowledge I have is for the period between June 2, 1931, and the latter part of 1931. To my knowledge Mrs. Smuckler did not, during this period, have a demonstration in our market.

On

## REDIRECT EXAMINATION

the witness testified:

As far as I know, from June 2, 1931 until November 1931 when I left Young's Market no French Veneer was sold at Young's. I will modify that because as I said a moment ago from memory up until possibly the first of September. After the first of September I was not very active in the department so I did not attempt to see what transpired in the way of retail sales. I don't know. But the instructions were positive that we were to sell no more French Veneer. They came not only from me but also from Mr. Young. We took it off the shelves the day we received the letter, even before it was answered.

(Testimony of C. F. Curtis—Winifred M. Jacobs)

C. F. CURTIS,

Witness for plaintiff, was duly sworn and on

DIRECT EXAMINATION

testified:

I am the Chief Clerk of the Southern California Telephone Company and have examined the Telephone Directories and card indexes with respect to Lena G. Smuckler, K. Smuckler and the French Veneer Manufacturing Company. The furthest back any of these names appears in the Directories is January 1916, and thereafter continuously to the present time.

On

CROSS-EXAMINATION

the WITNESS TESTIFIED:

The names of "L. Smuckler, K. Smuckler and French Veneer" appeared in different directories. Part of the service was under "L. Smuckler", part under "K. Smuckler", and "French Veneer" was in the classified advertising. There were about five different addresses during this time.

WINIFRED M. JACOBS,

witness on behalf of plaintiff, was sworn and on

DIRECT EXAMINATION

testified:

About nine years ago I first bought French Veneer at the May Company and purchased it from time to time since then until a few years ago when I went in and they told me they did not carry it any more.

(Testimony of Winifred M. Jacobs)

She was asked by plaintiff's counsel, "And did you recently attempt to buy French Veneer?", and the witness stated, "A week ago last Saturday I was going to the May Company and I saw a demonstration—"; counsel for defendant objected to this as "irrelevant, incompetent, immaterial and in no way binding upon the defendant nor within the issues of the pleadings as to what this woman could do", that "it was not within the elements of a libel, is purely speculative on the part of the witness and entirely without the issues of the case." Counsel for plaintiff replied the purpose of the testimony was to show sales resistance by the public to plaintiff's new product "French Polish", and that this could go to the question of damages that the plaintiff sustained because of the libelous actions of defendant and should be considered by the jury in assessing actual and punitive damages. The objection was overruled, an exception noted, and the witness testified that when she recently asked for French Veneer she did not obtain it but French Polish was offered to her, which she first refused to buy but did later buy when Mrs. Smucker told her that it was the same as French Veneer and that she had had to change the name.

On

## CROSS-EXAMINATION

the WITNESS TESTIFIED:

A long number of years elapsed between her purchases.

(Testimony of Lena G. Smuckler)

LENA G. SMUCKLER

was called as a witness in her own behalf, was duly sworn and on

DIRECT EXAMINATION

testified:

I was born in St. Paul, Minnesota, and will be 60 years old the 14th of next March. I moved to Portland, Oregon, in the early part of 1910, and began to make a furniture or automobile polish and to canvass it in Portland. After about a year Meyer & Frank Department Store permitted me to hold a demonstration. At that time I did not have a name for the product. I went to the State Fair and because I had always wanted to give it a French name, when one of my neighbors to whom I gave some, said "That is a wonderful veneer", I called it French Veneer.

The witness identified a Certificate of Award of the Oregon State Board of Agriculture, dated October 14, 1913. Over defendant's objection that it was "irrelevant, incompetent and immaterial, and not within the issues of this lawsuit", it was admitted as plaintiff's Exhibit 17, and to which exception was taken. She then identified two more Certificates, both being diplomas from the Oregon State Board of Agriculture, and being in 1912 and 1914. Over defendant's objection on the same ground as to Exhibit 17, the diplomas were admitted as plaintiff's Exhibits 18 and 19, and an exception was noted to the overruling.

She then testified that while she was in Portland and after she had taken the name "French Veneer" she had

(Testimony of Lena G. Smuckler)

never heard of "Liquid Veneer", before she came to Los Angeles she did business in Portland with Meyer & Frank's Department Store and Lippman & Wolf, Olds, Wortman & King, she could not name them all but she had all of the big stores, that she had a nice business in Washington. Over an overruled objection that the following testimony was incompetent, irrelevant and immaterial an exception was noted and she stated: Her husband was ill and did not at that time support the family, that she was supporting the family of herself, husband and five children and her only income was from this source of business. Before coming to Los Angeles she made one trip there and sold to Hambergers, which is now the May Company. She came to Los Angeles in 1915, had a demonstration and was in there about a year when Hamburgers received a letter from Liquid Veneer people and they came to her and told her she could not sell her French Veneer. About a year and a half after she came to Los Angeles she first heard from the Liquid Veneer Corporation, that being the latter part of 1917. She saw the letters Liquid Veneer Corporation was writing to her customers and her business started to dwindle down.

She further TESTIFIED: "I used to travel on the road and made all of the Cities and territories. I had Oregon, Washington and California. I could not give you the exact amount of customers but I had close on, you might say, 2000 customers up and down all these States and when they started getting these threatening letters my business just fell down to practically nothing. It just kind of made me heart sick and so I decided to stay right in California and then when the California customers got these letters they fell off one at a time. Before these

(Testimony of Lena G. Smuckler)

customers began to fall away, for years I used to have a mail order business in California of between 25 to 50 letters a day, most of them having checks with the order. I have here a card index representing a partial list of customers during 1920, 1921 and 1922. I had more records but a fire in my garage some time between 1921 and now destroyed most of my records. After I came to Los Angeles I had no other means of support except my income from this French Veneer polish. (This is over objection that it is incompetent, irrelevant and immaterial, which was overruled and exception noted.)

Q: BY MR. BALTER: All right, you tell the Court and Jury the extent of your business for the first few years that you came here, first.

MR. SHEEHAN: I will object to that on the same grounds, that it is irrelevant, incompetent and immaterial; inadmissible under the pleadings and no proper measure of damages in this case.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

A. I would take it about a little more or a little less than about a thousand dollars a month.

Q: BY MR. BALTER: A thousand dollars a month. Now, how long would you say you—

MR. SHEEHAN: I will ask that be stricken out on the ground that it is a speculation and it is a mere hazard and a guess, no record to prove it.

MR. BALTER: She has stated that her records were burned.

THE COURT: Overruled. Motion denied. Go on.

MR. SHEEHAN: Exception.

(Testimony of Lena G. Smuckler)

Q: BY MR. BALTER: That would be approximately ten or twelve thousand dollars a year. What was the cost of your merchandise on each sale?

MR. SHEEHAN: I will object to that on the same grounds, your Honor.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

A: Ten percent.

Q: BY MR. BALTER: In other words, do I gather that the product which you sold for 50 cents cost you 10 cents to manufacture?

A: Yes, sir.

MR. SHEEHAN: I will object to the form of that question, as to what the counsel gathers from what she is testifying.

MR. BALTER: I was trying to get her answer.

THE COURT: The form of your question seems to be a little irregular.

MR. BALTER: I will change the form, your Honor.

Q: BY MR. BALTER: What did the product which you sold for 50 cents actually cost you?

MR. SHEEHAN: I will object to that as not the proper measure of damages under any rule of damages.

THE COURT: Do I not understand that the witness has testified that she took in something like a thousand dollars a month?

MR. BALTER: That is right.

THE COURT: What did it cost her to do the business, to manufacture her product?

MR. BALTER: All right, put it that way.

A: To manufacture?



(Testimony of Lena G. Smuckler)

THE COURT: Yes, and to do the business that you did; what did it cost you for that thousand dollars a month, how much on an average?

MR. SHEEHAN: I wish to take exception to that.

A: On an average it would cost me about \$400.

Q: BY THE COURT: On an average?

A: Yes, sir.

MR. SHEEHAN: I will ask that the answer be stricken out.

THE COURT: Motion denied.

MR. SHEEHAN: Exception.

Q. BY MR. BALTER: Does that mean all your expenses for living expenses, or just to manufacture the product?

A: That was just to manufacture the product.

Q: Then, do I understand you to say that you netted about \$600. a month?

A: Yes, sir.

MR. SHEEHAN: I object to that as calling for the witness' conclusion.

THE COURT: Overruled.

MR. SHEEHAN: Exception.

WITNESS CONTINUED: I continued to obtain my principal source of income from it "until the year 1931. 1929 is when it dropped most and then in 1931 I had lost practically all and I had to depend upon my sons to support me. Until that time I obtained a substantial income from this business."

Q: BY MR. BALTER: After 1929, when the first letter was written to May Company, did your business fall off then?

A: Yes, sir.

(Testimony of Lena G. Smuckler)

MR. SHEEHAN: I object to that as irrelevant, incompetent, immaterial under the pleadings.

THE COURT: Objection overruled.

MR. SHEEHAN: Exception.

THE COURT: Answer the question.

A: Yes, sir.

THE COURT: You have already answered it.

Q: BY MR. BALTER: To what extent?

MR. SHEEHAN: Same objection.

A: to almost nothing.

MR. SHEEHAN: Save an exception.

A: I had to depend upon my sons to support me and also my home.

WITNESS CONTINUED: I sent out a communication to my customers with reference to the Liquid Veneer Corporation. "From the year '19, 1920, to about '28, I enclosed with every order a circular stating I had nothing to do with any other concern, that I sold French Veneer only". I made an attempt at the May Company to have them handle my product in all of their stores but this was never done. I saw the letter dated June 2, 1931, addressed to Young's Market, plaintiff's Exhibit 1.

Upon

#### CROSS EXAMINATION:

In 1920 and 1921 I had a large list of customers and on September 18, 1920, I filed a voluntary petition in bankruptcy and my son, Elijah Smuckler, listed himself as one of my creditors. At the bankruptcy sale I purchased back the assets. My husband had been ill for a number of years and he wanted me to sign over my business to

(Testimony of Lena G. Smuckler)

him under the community property law of California, which I refused to do, and that is why I went into bankruptcy. I never looked for a financial rating in any of the Mercantile Agencies, I never asked for any credit. I never filed an income tax return of any kind, State or Federal. I had exemptions I could claim under an income tax.

The Court then questioned the Witness. After an objection to a question by the defendant the Court stated, "it will be deemed that you have a specific objection to each question and exception. Overruled." The witness then testified: I cannot say how much business I did in 1928 because I haven't the records. My gross business, that is the amount I was receiving altogether from my manufacture and sale of French Veneer, in the year 1928, was "approximately between \$300 and \$400 a month, and then in 1929 it had fallen down and in 1930 to 1931 it had almost completely fallen down." I had no other source of income. When I first came here from Portland I lived in a 12 room home with a three car garage and I manufactured my product in the garage. From 1920 to 1923 I had a store on Pico Street. In 1927, 1928, 1929 and 1930 I lived at 311 South Cloverdale, where I lived for six years. I made my product at that place in my garage. I always made my product on the premises where I was living except when I had the store on Pico Street. I did not live there. Other retail stores than Young's Market and the May Company handled my product. I traveled all over and made regular trips to all of the Southern Counties of California. I did this "up until the year of about 1930—1929 and 1930, and then when I would go out and these customers would say, 'I can't buy', I just lost heart

(Testimony of Lena G. Smuckler)

in it and I just quit because it is an expense to travel when you are not making anything". Since my sales ceased I have supported myself by changing the name of French Veneer to French Polish and have also added a silver metal polish which I am now demonstrating. I am still in business.

Counsel for defendant asked if she did not know that after 1929 all business fell off after the beginning of the depression, to which she replied that she did so know and knew that it was still continuing.

On

#### REDIRECT EXAMINATION

she stated she did not contribute the complete stoppage of her business in 1929 and 1930 to the general depression.

The witness was excused and the following proceedings took place:

MR. BALTER: With respect to the letters in the file on the stationery of Liquid Veneer Corporation and signed by Martin J. Cabana, other than Exhibit 1, which is the copy, namely, Exhibits 2, 4, 5, 6, 7, 8, 14, 15 and 16, we desire to direct your Honor's attention to the affidavit of Martin J. Cabana on file in this case, filed May 2, 1932, in which he says:

"MARTIN J. CABANA, being duly sworn deposes and says that he is a resident of the City of Buffalo, County of Erie and State of New York, is executive vice president of Liquid Veneer Corporation, Defendant above named," and we wish to direct your Honor's and the jury's attention to the signature on that affidavit, subscribed and sworn to before a notary, "Martin J. Cabana."

(Testimony of Lena G. Smuckler)

THE COURT: You want to place that in evidence?

MR. BALTER: I want to place that in evidence as a plaintiff's exhibit, to be examined by the court and jury as a specimen of the signature of Martin J. Cabana to the letters which I have just specified.

THE CLERK: That will be Plaintiff's Exhibit 20.

MR. BALTER: For the purpose of authenticating the signature on those letters.

THE COURT: It will be deemed admitted prior to the introduction and offer of the letters.

MR. BALTER: Yes, your Honor.

THE COURT: Very well. Anything further?

MR. BALTER: That is all, your Honor.

Whereupon the plaintiff rested her case.

Counsel for defendant stated he would like to make a motion and suggested excusing the jury. The jury was thereupon retired and the following proceedings were had out of their presence and hearing:

MR. SHEEHAN: Your Honor, at this time I make a motion for non-suit on the ground that the plaintiff has failed to establish any cause of action whatsoever against the defendant, and particularly has failed to establish any cause of action alleged in the complaint; and on the further ground that the complaint fails to allege a cause of action against the defendant. And on those points I call your Honor's particular attention to the fact that the letter set out in the complaint under June 2, 1931, is addressed to the Young's Market and that it appears from the letter itself and from the evidence which has been introduced that the Liquid Veneer Corporation, a manufacturer of a polish called Liquid Veneer had business rela-

tions with the defendant Young's Market, and that the communication on its face shows that the Liquid Veneer Corporation was a party interested in the subject of the communication, and that the communication was sent to a distributor who is and was likewise interested; that, on its face it is a communication in the trade from one party to another concerning their business relations and that the plaintiff is not named in the communication; and that there is no allegation in the complaint in any way which alleges that this complaint or this letter was written of and concerning Lena G. Smuckler, nor is there any evidence in the case which connects this letter with Lena G. Smuckler, the plaintiff in this action. And further, there is nothing in the letter and nothing in the complaint which shows that this letter in question, directed on its face to Young's Market, was ever brought to the attention of anyone in the Young's Market who knew that it referred to Lena G. Smuckler, the plaintiff in this action; that at no place in the letter is the name of Lena G. Smuckler appearing as a party referred to in any respect and, in fact, it appears from the face of the letter itself that the writer did not know who Lena G. Smuckler was because it appears that the party referred to often as "French Veneer" is referred to in the masculine gender.

(Further argument and discussion of counsel omitted from transcript.)

In the course of defendant's argument for non-suit, counsel for plaintiff moved "that the complaint be amended in Paragraph VI to the effect that the letter was intended to refer to the plaintiff, Lena G. Smuckler."

MR. SHEEHAN: Of course, I will have to object to that, your Honor, at this stage of the proceedings when the case is closed.



MR. BALTER: It is not damaging you in any way.

MR. SHEEHAN: It is not?

MR. BALTER: You knew what this case was for three years.

THE COURT: Well, the motion is granted, but I want you to file an amendment. I will not take the course done before. You file an amendment as soon as you may, re-alleging Paragraph VI.

MR. BALTER: Alleging that it refers to the plaintiff, Lena G. Smuckler.

MR. SHEEHAN: I will object to it and take an exception.

THE COURT: A moment. Exception to the defendant.

Further argument was then had on the motion for non-suit and thereupon the Court took the Motion under submission, stating:

“Very well. I will not pass upon this motion. I am fairly sure that the motion will be overruled. However, I prefer to study a certain phase of the objection, but it will stand submitted and if you have only one witness we will finish up with him and finish the evidence now. That is as far as we will go tonight, anyhow.”

Counsel for defendant then moved the Court to amend the answer to allege that the communication “is a privileged communication by one party having an interest to another party having an interest, and that it is a communication in trade.” Over objection and exception permission to amend was given counsel to file an amendment.

The jury was then returned into the Court Room and the following proceedings were had in their presence and hearing.



(Testimony of Erna M. Kaster)

ERNA M. KASTER,

witness in behalf of defendant, being sworn, testified on

DIRECT EXAMINATION

as follows:

I have been employed at the May Company since 1921. Since 1926 I have been working for the Liquid Veneer people, and it pays me. I am saleslady and demonstrator at the May Company, selling the May Company's merchandise and demonstrating Liquid Veneer. The Liquid Veneer I demonstrate is the property of the May Company. To my own knowledge, during 1929, 1930 and 1931, French Veneer was on sale at the May Company. The labels on the polish were changed in 1933, after I was summonsed to Court here at that time. Prior to that time the labels had not been changed. I saw Mrs. Smuckler make the change. At various intervals during the years 1929, 1930, 1931, 1932 and 1933 Mrs. Smuckler demonstrated French Veneer at the May Company. These demonstrations were on the same floor as the Liquid Veneer, were visible, and I saw them. During these demonstrations she would sell her French Veneer. When our stock of Liquid Veneer runs low we take a stock sheet to Mr. Max, the buyer, he gives it an O. K. and it is then turned over to the girls in the office, they write up the orders and send them in to Buffalo. The goods are then shipped from Buffalo to the May Company. Some comes by boat and by fast train. If I am sort of short they are

(Testimony of Erna M. Kaster)

run by fast train or routed through San Francisco. All of this Liquid Veneer stock comes from Buffalo by these various methods. The Liquid Veneer business fell off very much subsequent to 1929. I observed the sales of French Veneer, subsequent to the year 1929, fell off too; they all fell off, the business of the whole department.

On

### CROSS-EXAMINATION

the WITNESS TESTIFIED:

Mrs. Smuckler and I sell competing products. There is no ill feeling between us. I believe it was after 1933, in that Fall, that Mrs. Smuckler changed the labels and French Polish was sold in place of French Veneer. I heard the reading of the letter of Mr. Strauss, signed April 2, 1929, in which he says from that day on he would discontinue the sale of French Veneer but he never did. It was sold and kept in stock until Mrs. Smuckler changed the labels. She put a sticker labeled "Polish", over the word "Veneer" so that it read "French Polish". Now she has different labels, she doesn't have to paste them on now.

I testified at a previous hearing in this case that certain orders were routed through San Francisco, but it was never billed from San Francisco, but always from Buffalo. The merchandise which comes to the May Company actually comes from Buffalo.

Counsel for defendant offers into evidence Trade-mark No. 56782 issued on "Liquid Veneer" on October 16, 1906, and renewed on the 22nd day of June, 1926, to Liquid Veneer Corporation, which was admitted as defendant's Exhibit "B", whereupon defendant rested, counsel stating he had his instructions and the exceptions to the instructions ready for the Court. The Court thereupon adjourned to May 9, 1935. On that day, out of the hearing of the jury and in their absence, the following proceedings took place. Counsel for plaintiff opposed the filing of defendant's amendment to Answer on the ground that it sets up evidentiary and argumentative matters and stated, "For the purpose of the record, your Honor, I want to move to strike the Answer from the files and have a ruling on that.

THE COURT: Motion denied.

MR. SHEEHAN: Mr. Balter, there is a trade-mark—

The COURT: You had better take an exception to that, Mr. Balter.

MR. BALTER: Isn't that the same thing you introduced? Yes, I will take an exception, your Honor. Is that the same thing introduced?

Trade-mark Certificate of the Liquid Veneer Corporation was admitted as defendant's Exhibit.

Over defendant's objection and exception the Exhibits introduced on the hearing of Motion to Quash, on May 13, 1933, were introduced into evidence as plaintiff's Exhibits 21 to 32 inclusive, and being as follows:

Nature of document	Dated	Exhibit No.	
		on Motion to Quash	Exhibit No. at trial
Invoice	7- 7-32	1	21
Invoice	7-18-32	2	22
Frts. Bill	7-12-32	3	23
B/L	4-13-32	4	24
B/L	4-16-32	5	25
Frts. Bill	4-18-32	6	26
Invoice	2-16-33	7	27
Invoice	2-17-33	8	28
Invoice	4-30-30	9	29
Invoice	3-20-31	10	30
Photocopy			
Frts. Bill	5- 1-30	11	31
Photocopy			
Frts. Bill	3-14-31	12	32

Counsel for plaintiff then states:

“At this time, your Honor, I would like to make a motion for a directed verdict for the plaintiff on the following grounds: That the letter is libelous per se as a matter of law, inasmuch as, without extrinsic evidence, if it is read by itself, it tends to injure the plaintiff in her business or occupation, according to the well-established law involved; that if, as we believe, it is a libel per se as a matter of law, malice is presumed and some damage is

presumed. The burden of proof is on the defendant to prove that the allegations made in its letter are true. The falsity of the charges are presumed. There is absolutely no evidence in the record on the part of defendant that the charges made in the letter are true. In fact, we have even ourselves assumed the burden, your Honor, of showing they are false. The only thing in the record which the defendant has at all besides this answer, which, as I have cited to you in the case of Peterson v. Rasmussen definitely states must be proved, the privilege."

The Court denied the motion, allowing exception to plaintiff.

The evidence being all in and the case closed, counsel for defendant renewed his Motion to Dismiss and stated:

"I want to renew my motion now, Judge. At this time, as I understand it now, the case being all closed, I will renew my motion to dismiss the plaintiff's complaint on all the grounds heretofore stated in my original motion; and on the additional ground that there is now nothing before this Court which would entitle the—there is no additional evidence since my motion or anything else being before this court which would entitle the plaintiff to maintain the action alleged in the complaint, or any cause of action whatsoever."

The motion was denied and exception to defendant noted.

Respective counsel had heretofore submitted to the Court proposed instructions to the jury and each had submitted to the Court exceptions to certain instructions proposed by the other.

The instructions proposed and requested by defendant are as follows:

## I

You are directed to return a verdict in favor of defendant.

In case the court refuses to give the foregoing instruction, then, and in that event only, the defendant requests each of the following instructions:

## II

Passion, prejudice and sympathy have no place in your considerations or in your deliberations. The fact that the defendant is a corporation cannot and must not be considered by you. It is entitled to *submitted proposed instructions to the jury and each had submitted exceptions to certain instructions proposed by the other. The instructions proposed and requested by defendant are as follows:*

## I

*You are directed to return a verdict in favor of the defendant.*

*In case the Court refuses to give the foregoing instruction, then, and in that event only, the defendant requests each of the following instructions:*

## II

*Passion, prejudice and sympathy have no place in your considerations or in your deliberations. The fact that the defendant is a corporation cannot and must not be considered by you. It is entitled to*

the same fair treatment and the same consideration at your hands as a private individual, no more and no less.

It is your duty, without sympathy, prejudice or passion, to calmly consider the evidence and upon a consideration of the evidence and the law applicable thereto render your verdict. In considering the evidence and attempting to determine the truth of the matter in controversy, you should not be influenced by sympathy for the plaintiff or prejudice against the defendant, nor by the fact that the plaintiff is a private individual and the defendant a corporation. It is your duty to base your verdict solely and entirely upon the evidence and the law as I have given them in these instructions.

### III.

The defendant in this case is charged by the plaintiff with libel. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. Therefore, in order to recover, the plaintiff must prove by a preponderance of the evidence that the defendant published (1) a false statement, (2) which was not privileged and (3) which exposed the plaintiff to hatred, contempt, ridicule or obloquy, or which caused her to be shunned or avoided or which had a tendency to injure her in her occupation. If plaintiff fails to prove by a preponderance of the evidence that the statements in the alleged libelous communications were false or that they exposed the plaintiff to hatred, contempt, ridicule or obloquy, or caused her to be shunned or avoided, or which had a tendency to injure her in her occupation, then your verdict must be in favor of the defendant.



## IV.

The Court instructs you that, as a matter of law, communications relied on by plaintiff in this action are privileged communications and that, therefore, plaintiff cannot recover unless she proves by a preponderance of the evidence that said publication or publications even though false were sent out by the defendant with malicious intent. Malice is a desire and disposition to injure another founded upon spite or ill will. Therefore, if you should find that the alleged publications even though false were not founded upon enmity to the plaintiff but were made with the sole desire on defendant's part to protect its own interests, then your verdict must be for the defendant.

## V.

Malice cannot be inferred from the mere sending of the letters relied upon by the plaintiff in this case and plaintiff, in order to recover, must prove that the sending of said letter or letters was motivated by spite or ill will by the defendant to the plaintiff.

## VI.

If you find the statements in the alleged libelous publications to be true, then your verdict must be in favor of the defendant. In this connection, the letters relied upon by plaintiff state that plaintiff was infringing its registered trade-mark. You are instructed that, if defendant honestly believed that plaintiff was an infringer, said statements were and are not libelous.

## VII.

In civil cases a preponderance of evidence is all that is required and by "a preponderance of evidence" is meant such evidence as, when weighed with that opposed to it,

has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.

### VIII.

The fact that I instruct you upon the measure of damages which the plaintiff is entitled to recover is not to be taken by you as an intimation that I either believe or do not believe she is entitled to recover damages. It is my duty to instruct you fully upon the law governing every issue in this case. The instructions upon the measure of damages are given you to guide you in fixing the damages which plaintiff is entitled to recover only in the event you believe from the evidence and the instructions I have given you that the plaintiff is entitled to recover. The giving of such instructions is no indication that the Court believes or does not believe that the plaintiff is entitled to recover. That is a question for your sole and exclusive determination upon the evidence and the instructions which I have given you. If you determine that the plaintiff is entitled to recover, then you are to fix her damages in accordance with the rules which I give you. If on the other hand you believe from the evidence and the instructions I give you that the plaintiff is not entitled to recover, then the plaintiff cannot recover and it is your duty to lay aside entirely the question of damages she is entitled to recover and the instructions given thereon and return your verdict against the plaintiff and in favor of the defendant.

## IX.

You are instructed that plaintiff may only recover for damages flowing directly and proximately from the publication of that certain letter from the Liquid Veneer Corporation to Young's Market, dated June 2, 1931, and you cannot assess damages against the defendant for any damages resulting to plaintiff from any other letters or any other alleged libelous publications.

## X.

In assessing the actual damages sustained by plaintiff you are not to indulge in speculation but you will assess the actual damages in such an amount as will fully and fairly compensate the plaintiff for any injury suffered by her by reason of the acts and things alleged in the complaint.

## XI.

You are hereby instructed that the defendant's trademark "Liquid Veneer" is a valid trademark and that the use by the defendant of the word "veneer" is an infringement thereof.

Both parties having rested, having submitted proposed instructions and exceptions to those proposed by the other, having made motions at the close of the evidence, one for a non-suit and the other for a directed verdict, and each having been denied and exceptions noted to each and the cause being ready for submission to the jury, the following charge was given.

## COURT'S CHARGE TO JURY.

THE COURT: As you know, gentlemen, the action is one for damages following or as the result of the sending of a letter. I will not read the letter. I may have occasion to refer to one or two sentences in it. The law of California with respect to this matter is that libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

Further, with respect to the two qualities that it must possess, that is, falsity and unprivileged, it is not necessary to tell you what "false" is, of course. You know that.

Under the law an unprivileged communication as applied to this case is a communication made without malice. If malice exists then privilege cannot be claimed. "To a person interested therein," that is, interested in the communication. It might reasonably be said that the Young Company or The May Company—the Young Company this letter was addressed to, I believe,—was interested in the subject. "By one who is also interested." That would be the Liquid Veneer Corporation. "Or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent or was requested by the person interested to give the information." In other words, if this were a legitimate trade necessity, a legitimate communication from one business house to another and written in good faith and everything true in it, it would be a privileged communication and recovery could not be had for it. However, if it is not made in good

faith, though it be true, it is not privileged. IF it is false, though it otherwise agrees with the definition of "privilege", it is not privileged.

Now, taking the communication itself you can pass upon that, I think, without any very great difficulty. In one paragraph of it it says: "We have had more or less difficulty with these people \* \* \*." I will say further at this point that the communication must refer to the person claiming to be injured, and in this case the complaint charges that the plaintiff in the action was the one referred to in the letter. I do not know whether that is denied or not. I will assume that it is denied in the answer, but you must find from the evidence that the letter did refer to the plaintiff here.

It goes on to say: "We have had more or less difficulty with these people who manufacture this so-called 'French Veneer',"—you may draw your conclusion from that as to whether this plaintiff was referred to. "have tried to purchase evidence against them individually." I suppose, meaning that they tried to buy their product from them, from the manufacturer of French Veneer to be used as evidence, "but they moved around from one place to another, denied their identity when we did catch up with them and after investigating them found their financial condition such as would not warrant litigation."

Now, gentlemen, consider seriously whether those statements are true. You are at liberty to and should contrast that with the statement of the witnesses here that the telephone of this woman was in the telephone *of this woman was in the telephone* directory throughout the time. I think the representative of the Young store said he had never any difficulty—in fact, both witnesses stated they

had never had any difficulty in finding her. And you will thereupon conclude whether that is a true statement.

Speaking again of the manufacturer of French Veneer, the letter goes on to say:

“His object for adopting the name ‘French Veneer’ is obvious. He is trying to trade on our rights.”

That, I think, as counsel stated, if a fact, is a criminal offense and infringement under the federal statutes. Infringement of an interstate trade-mark may be punished criminally.

Now, having all of those things in mind, you will make up your minds whether this exposes the plaintiff to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his business.

As a matter of fact, a substance which is of general knowledge, like wood, iron, paint, that in and of itself is not the subject of the exclusive appropriation of anybody as a trade right. You sell a certain kind of flour or a certain kind of oatmeal or what not, naturally, of course, nobody can claim an exclusive right in a generic name of a well-known material exclusively. The combination only may be appropriated. The right in a trade-mark is based upon the tendency to deceive the public; that one will sell his own goods to the public intending and under conditions where the public believe them to be the goods of someone else.

Repeating somewhat of what I have said before, the defendant in this case is charged by the plaintiff with libel. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to



the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. Therefore, in order to recover, the plaintiff must prove by a preponderance of the evidence that the defendant published, first, a false statement, second, which was not privileged, and third, which exposed the plaintiff to hatred, contempt, ridicule, or obloquy, or which caused her to be shunned or avoided, or which had a tendency to injure her in her occupation.

If the plaintiff fails to prove by a preponderance of the evidence that the statements in the alleged libelous communication were false or that they exposed the plaintiff to hatred, contempt, ridicule, or obloquy, or caused her to be shunned or avoided, or which had a tendency to injure her in her occupation, then your verdict must be in favor of the defendant.

The plaintiff must, as suggested there, establish her case by a preponderance of the evidence. You are not, of course, to be controlled by your emotions. No jury should do that. You are not in passing upon this case to be influenced by feeling, by prejudice, or by sympathy, but you must find and be governed only by your finding as to what the facts are.

Now, with reference to the various letters that were offered in evidence other than the indictment letter—I should not say “the indictment letter”. I mean the letter that is pleaded and upon which the damage is based. You cannot base your damages or verdict for damages, in the event you should find damages, on any of those letters. And in that respect, gentlemen, when I use the term “damages” I am not intimating to you an opinion that damage



has been suffered or that you should return a verdict in any way.

They are offered and were offered for the purpose of showing malice. If they show or tend to show a continual desire or intention on the part of the defendant to injure the plaintiff, then you may consider them. That is their purpose, and not for the purpose of showing damage, as is the letter which has been pleaded in the complaint.

With respect to damages the law provides that for the breach of an obligation not arising from contract—that in this case, what the plaintiff claims to be—the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. In other words, the damages must be such, in the event you should find a verdict for the plaintiff, that are proximately, that is, directly, caused by the acts of the defendant.

In addition thereto, however, gentlemen, the law in this state and, I guess in every state, provides for what are known as exemplary damages that mean something different from actual damages.

In an action for the breach of an obligation not arising from contract, such as is charged in this case, where the defendant has been guilty of oppression or fraud or malice—and in this case it would mean express malice—the plaintiff in addition to actual damages may recover damages for the sake of example and by way of punishing the defendant.

If, now, you think that this method used by the defendant was engendered and rested in the purpose to destroy the business of the plaintiff, was done and made with ill-will toward the plaintiff, or accompanied and did

itself consist in an act of oppression, then you are at liberty to award exemplary damages; that is, exemplary as opposed to compensatory, meaning damages that are to reimburse for actual loss suffered, and you may award exemplary damages, that is, damages by way of example.

You take the case with you. You are not controlled by any opinion that the Court directly or inferentially may have expressed. You are not to be governed by passion nor prejudice, but consider the case carefully, gentlemen, and if, in the event you find for the plaintiff, you may consider those two features and fix the amount at such as you think in the one case she has actually suffered, and in the other case that she should be awarded by reason of and in the way of exemplary damages.

Defendant excepted to portions of the Court's Charge as follows:

MR. SHEEHAN: Your Honor, I believe your Honor mis-spoke when you first addressed the jury and you said "unprivileged" when your Honor really meant "privileged." In your definition of the privileged communication, that it is a communication by one person having an interest in the matter to another person having a like interest, that is, between two business houses, and I think your Honor misspoke on that.

THE COURT: I read the section. That ought to be good enough.

MR. SHEEHAN: You did, but you misspoke yourself, your Honor, as I recollect it.

I wish to except to your Honor's failure to give each instruction submitted by defendant; and also except to all plaintiff's proposed instructions in so far as those were given.

I then wish to except to that part of your Honor's charge in which you stated that in a privileged communication that if the matters were false, that that could be charged against the defendant; and I ask your Honor to charge that if the communication is privileged that even though the matters were false or uttered under a mistaken belief that the communication still remains privileged.

THE COURT: Yes, you may take that instruction. I think that is correct. However, I emphasized or intended to emphasize, that true or false, it must be done in good faith. Very well.

MR. SHEEHAN: And just the other, the statute says that malice cannot be inferred before or after in a privileged communication.

THE COURT: Yes.

MR. SHEEHAN: I except on the ground that the Court submits to the jury, as a matter of law, what seems to be a question of infringement. I do not think that is in this case whatsoever. The defendant has a trade-mark. As to what it believed was its rights under that trade-mark is the only thing that is pertinent.

The case was then submitted to the jury and it returned the verdict on May 9, 1935, as follows:

## VERDICT OF THE JURY AND ENTRY OF JUDGMENT.

“We, the jury in the above entitled case, find in favor of the plaintiff, and assess her actual or compensatory damages in the sum of \$11,000.00; and her punitive or exemplary damages in the sum of \$9,000.00, making a total of Twenty Thousand Dollars, (\$20,000.00).”

On May 10, 1935, judgment in favor of plaintiff and against defendant in the sum of \$20,000.00 was entered in Judgment Book 7, at page 754.

## MOTION FOR NEW TRIAL AND DISMISSAL.

On the 9th day of July, 1935, defendant served and filed (a) Motion to set aside verdict and for new trial and (b) Motion to Dismiss.

The Motion for new trial was based on the grounds that (1) This Court has not nor has it ever had any jurisdiction over the defendant in that (a) it was not on March 1, 1932, the date of the service of summons by serving the Secretary of State of the State of California, or at any time prior thereto, nor at the present time, a resident or citizen of the State of California, or of the Southern District of California, Central Division, (b) it was not during all or any of said times doing, conducting, transacting or carrying on any business in the State of California or in said District, (c) said Secretary of State or any deputy or assistant thereto was not authorized on its behalf to receive process, and (d) that the service of

process upon said Secretary of state did not confer jurisdiction over the defendant for the reason that Section 406a of the Civil Code of the State of California had not been fully complied with before process could be served upon defendant by serving said Secretary of State of the State of California; (2) the verdict of the jury was excessive and indicated gross error and reckless disregard of the evidence and indicated the jury was actuated by improper motive, passion and prejudice; (3) the evidence was insufficient to justify the verdict; (4) the Court erred to the prejudice of defendant in (a) refusing to entertain defendant's Motion to Dismiss, on the ground that the complaint failed to state facts sufficient to constitute a cause of action, (b) overruling objections of defendant to an introduction into evidence of plaintiff's Exhibits, (c) permitting plaintiff to amend as to jurisdictional matter during trial and as to the identity of the person of whom the letter was written at the close of trial and after motion for non-suit was made, and (d) erroneously instructing the jury, and; (5) the complaint still failed to state a cause of action.

The Motion to Dismiss was made on the same grounds of lack of jurisdiction over the defendant as set forth in the motion to set aside verdict and for new trial.

Said Motions were further based upon the records, files, affidavits and evidence in this proceeding and the affidavit of Robert V. Jordan, reading as follows, to-wit:

"AFFIDAVIT OF ROBERT V. JORDAN

[illegible]

ROBERT V. JORDAN, being first duly sworn, deposes and says:

That he is and at all of the times herein mentioned was the Assistant Secretary of State of the State of California; that on the 1st day of March, 1932, there was received by mail in the office of the Secretary of State of the State of California, in the City of Sacramento of said State, a letter from Elijah M. Smuckler, of Los Angeles, California, dated January 30, 1932, of which the attached Exhibit "A" is a photostatic copy and in which letter was enclosed duplicate copies of Complaint and Summons in the case of LENA G. SMUCKLER, doing business as FRENCH VENEER MANUFACTURING COMPANY, Plaintiff, v. LIQUID VENEER CORPORATION, a corporation, defendant, together with a check in the sum of \$5.00.

That there are not now on file nor have there ever been on file in the office of the Secretary of State any copies of the Articles of Incorporation of the Liquid Veneer Corporation, or any statement of Liquid Veneer Corporation, of any kind or character, or any designation of any person as the agent of said Liquid Veneer Corporation for service of process or authorized to receive service of process, or any consent of said Liquid Veneer Corporation

to the service of process or of any document or paper of any kind or character for or on behalf of said Liquid Veneer Corporation, and that said corporation is not now and never has at any time been qualified to do business in the State of California; that the only information in the office of the Secretary of State of California showing or purporting to show the name and address of the Pacific Coast representative of said corporation, if there be such, and the principal place of business of said corporation, is that contained in said letter dated January 30, 1932, from Elijah M. Smuckler, of which the attached hereto Exhibit "A" is a photostatic copy.

ROBERT V. JORDAN

Subscribed and sworn to before me this 17th day of June, 1935.

F. G. GRIEBNOW, JR.,  
Notary Public in and for the above County and State."



The photostatic copy of letter referred to as Exhibit "A" in said affidavit reads as follows:

"LAW OFFICE  
ELIJAH M. SMUCKLER  
SUITE 923 ROWAN BUILDING,  
LOS ANGELES  
TRinity 0311

January 30th, 1932.

Secretary of State,  
Sacramento, California.

Dear Sir:—

Enclosed herewith are duplicate copies of complaint and summons in the case of Lena G. Smuckler, doing business as French Veneer Manufacturing Company, plaintiff vs. Liquid Veneer Corporation, a corporation, defendant, together with a fee of \$5.00.

The corporation has as its Pacific Coast representative, Mr. C. E. Mack, 1890 Grove Street, San Francisco, Californai, and the *principle* place of business of said corporation is Buffalo, New York.

Please issue your usual certificate and return to me.

Very truly yours,

ELIJAH M. SMUCKLER,"

EMS-CS

(3) Encls:

The hearings upon said motions for New Trial and for Dismissal were noticed for the 15th day of July, 1935. On said date the hearings upon said motions were continued by the Court to the 29th day of July, 1935, upon Stipulation of the parties, to give plaintiff an opportunity to reply to said motions. On the 26th day of July, 1935, plaintiff, in reply to the Brief of defendant and its Motion to Dismiss, filed a Brief and the affidavits of John Brash, Byron Jack Badham, Jr., and Isador I. Smuckler, and which affidavits are as follows, to-wit:

“AFFIDAVIT OF JOHN BRASH

COUNTY OF SAN FRANCISCO, )  
 ) SS  
 STATE OF CALIFORNIA, )

JOHN BRASH, being first duly sworn on oath deposes and says:

That he is, and for more than ten (10) years last past, has been the Superintendent of a warehouse now operated by the *Haslet* Warehouse Company, at the corner of 2nd and Brannan Streets in San Francisco, California, now known as Humboldt Warehouse of the Haslett Warehouse Company, and which, up to January 1, 1932, was known as Lawrence Warehouse #19.

That as such superintendent of such warehouse it has at all times been a part of his duties to know, and he has known of the customers or patrons of said warehouse and the manner and way in which the goods of said customers or patrons were handled and kept by said warehouses.

That the business conducted by said warehouses is a general warehouse business of storing and shipping

various articles of merchandise which may come into its possession by said customers or patrons.

That affiant knows, and at all times herein mentioned has known of business concern, Liquid Veneer Corporation of Buffalo, N. Y. and that during all of said time up to and until May 4, 1932 said Liquid Veneer Corporation has maintained an account with said warehouse companies and maintained a stock of merchandise therewith:

That on or about May 4, 1932 said account and merchandise was transferred to the G. A. Hosmer Co. in which last mentioned name account has remained, until April 18, 1935, at which time the said G. A. Hosmer Co. instructed said Haslett Warehouse Co. to ship all of its Liquid Veneer Products merchandise out of the state temporarily.

That at all times herein mentioned, said Liquid Veneer Corporation and for G. A. Hosmer Co. has maintained with said Lawrence Warehouse Co. and said Haslett Warehouse Co. as the case may be, a stock of Merchandise, which would be stored in said warehouses until,

1—Orders were received to fill any order sent in by said Liquid Veneer Corporation or said G. A. Hosmer Co.

2—Local customers, which were on the accredited list of said Liquid Veneer Corporation or G. A. Hosmer Co. would call said warehouse companies and request various amounts of such merchandise to be delivered without direct order from Liquid Veneer Corporation after which the said warehouse companies would inform the said Liquid Veneer Corporation or G. A. Hosmer Co. as the case may be of the request for and delivery of such merchandise, to said accredited customers,

That a certain amount of such merchandise was always kept on hand at said warehouses for the purpose of securing the warehouseman's lien for storage thereof and services rendered to its said customers herein above referred to and for the purpose of filling future orders.

That said Liquid Veneer Corporation or G. A. Hosmer Co. would ship to said warehouses carload quantities of its merchandise, which was stored until sold, which took from one month to two years or more to-wit:

1.—On September 8, 1931, there was on hand in said warehouse 2 cases of 12 gross each of such merchandise from a particular shipment which was disposed of by orders at various times and dates up to and until May 18, 1935.

2.—On February 3, 1930 said warehouse had on hand 23 cases and 14 dozen of merchandise from a particular shipment of said Liquid Veneer Corporation which was afterwards sold at various times and dates up to May 1, 1932. When balance of said merchandise was ordered shipped out on order of G. A. Hosmer Co.

3.—On January 16, 1932 said warehouse had on hand 11 cases of merchandise from a particular shipment of said Liquid Veneer Corporation which was afterwards sold at various times and dates up to March 12, 1934, at which time there was left of said lot or shipment of merchandise 7 cases there of and on January 24, 1935 said 7 cases were delivered on order of G. A. Hosmer Co. That such statements of shipments and the dates and methods of delivery of said merchandise are taken from the permanent records of said warehouses which are too numerous to set forth herein, all of which are typical of said records herein above set forth and which reflect the

method or methods of handling, delivering or storing the merchandise of said Liquid Veneer Corporation.

That on May 4, 1932, the said Haslett Warehouse Co. received a letter Dated April 30, 1932 from the Liquid Veneer Corporation instructing said warehouse Company to transfer all merchandise and records to the account of G. A. Hosmer Co. effective as of February 1, 1932 and make all future shipments and bills for the account of G. A. Hosmer Co.

That no merchandise was ever received from said Liquid Veneer Corporation or G. A. Hosmer Co. on consignment basis, but was at all times received for storage to be held until such time as future sale orders were received for same which in some instances such orders were not received for as long as 2 years thereafter.

That the foregoing is a true statement of the method or methods used by the Lawrence Warehouse Co. #19, now known as the Humboldt Warehouse of the Haslett Warehouse Co. in receiving handling, storing and shipping the merchandise of the said Liquid Veneer Corporation and G. A. Hosmer. Co.

This Affidavit is given pursuant to a subpoena and subpoena duces *taken* and issued July 13, 1935, in the above entitled matter and served upon the said Haslett Warehouse Co.

Affiant JOHN BRASH

Subscribed and sworn to before me this 18th day of July, 1935.

ANNE F. HASTY

Notary Public in and for said county and state."

## "AFFIDAVIT OF BYRON JACK BADHAM JR."

"STATE OF CALIFORNIA        )  
COUNTY OF LOS ANGELES ) SS

Byron Jack Badham Jr., being first duly sworn, deposes and says:

That for the past eleven (11) years, he has been connected with the Hoffman Hardware Company of Los Angeles, California, and in the past ten (10) years as purchasing agent. That in his capacity as purchasing agent, he is intimately acquainted with the merchandising methods of Hoffman Hardware Company. That Hoffman Hardware Company has for many years last past, including the past six (6) years, bought merchandise from the Liquid Veneer Corporation of Buffalo, New York. That affiant personally knows E. C. Mack who is the Pacific Coast representative of the Liquid Veneer Corporation and that he has dealt with said E. C. Mack for the past six (6) years. That during these years and with particular reference to the years 1931 and 1932 said E. C. Mack would visit the Hoffman Hardware Company regularly on the average of every two (2) or three (3) months. That during said times, said E. C. Mack on behalf of the Liquid Veneer Corporation would solicit business for the Liquid Veneer Corporation and would endeavor to sell Hoffman Hardware Company increased quantities of the various Liquid Veneer Products. That the said Hoffman Hardware Company would look to said E. C. Mack as the person with whom all matters relating to Liquid Veneer Corporation could on numerous occasions be discussed and straightened out. That generally all orders of Liquid Veneer products would be mailed directly to Lawrence Warehouse #19, in San Francisco, California, now



known as the Humbolt warehouse of the Haslett Warehouse Company, or to the said E. C. Mack, at his San Francisco, California address, and shortly thereafter, generally within three (3) or four (4) days, the said orders were filled from the Liquid Veneer Corporation's stock of merchandise left at the Lawrence Warehouse (since 1932 known as the Haslett Warehouse) in San Francisco, California. Rarely were the orders either sent directly to Buffalo New York or filled from merchandise sent from Buffalo, New York, for the express purpose of filling the orders; and never was it necessary as a matter of policy for any orders first to be approved by the home office of the said Liquid Veneer Corporation at Buffalo, New York, before the said would be filled from merchandise on hand at the Warehouse in San Francisco, California, which warehouse was always designated on the invoices of the Liquid Veneer Corporation as "Our Warehouse at San Francisco".

Affiant further *state* that the invoices attached to this affidavit are of the original records of the Hoffman Hardware Company and correctly indicate that during all of the years the Hoffman Hardware Company did business with Liquid Veneer Corporation, the orders were filled from the designated Liquid Veneer Corporation's warehouse at San Francisco, California.

BYRON JACK BADHAM JR.

Byron Jack Badham Jr.

Subscribed and sworn to before me this 25th day of July, 1935.

CLARA M. MEYER

Notary Public in and for said County and State."

(Photostats.)



375-377 ELLICOTT STREET

# LIQUID VENEER CORPORATION

BUFFALO, N.Y.

SEP 5 - 1930

HOFFMAN HARDWARE CO.

528219

DATE AUG 25 1930

SOLD TO: HOFFMAN HARDWARE CO.  
229-25 30. LOS ANGELES ST.  
LOS ANGELES, CALIF. **O.K.**

SHIPPED TO:

VIA: P S S CO- FRT. ALLOWED

DATE SOLD 8/12/30 ORDER ENTERED 8/18/30 CUSTOMER'S ORDER 18578

TERMS 30 DAYS NET 2% 10 DAYS

QUANTITY	DESCRIPTION	PRICE	EXTENSION	TOTAL
✓ 6	DOZEN 4 OZ. LIQUID VENEER @ PER DOZEN	2.40	14.40	✓
	LESS 20%		2.88	11.52
✓ 3	SUCCESS DEALS- NEVERLEAK GASKET SHELLAC @ PER EACH	4.86	14.58	✓
✓ 2	BIG GIANT DEALS- NEVERLEAK TIRE FLUID @ PER EACH	14.40	28.80	43.38 ✓
8	SHIPPED FROM WAREHOUSE AT SAN FRANCISCO, CALIF. AUG 20 1930			54.90 ✓

*Handwritten notes and stamps:*  
 Date Recd. 8-26-30  
 Price P. K.  
 Extension  
 Total Wt.  
 Frl. Rate  
 No. of Cases

ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 30 DAYS FROM RECEIPT OF GOODS

## INVOICE



RECEIVED  
PAYMENT  
DEC 4 1931  
HOFFMAN HARDWARE CO.  
12-4

Sold to · HOFFMAN HARDWARE COMPANY,  
229 30. LOS ANGELES ST.  
LOS ANGELES, CALIF.

SHIP TO  
137  
VIA FRT. ALLOWED

**O. K.**  
**Priced Out**  
**B.**

TERMS—CASH, Less 2% in 10 Days—30 Days Net

INVOICE DATE NOV 24 1931

ORDER REC'D	11/23/31	DATE ENTERED	11/23/31	ENTERED BY	S	SHIP FROM	W	BUYER	361	SALES-MAN	16- M	CLASS	W
Quantity	DESCRIPTION										Net Per Doz.	TOTAL	
DOZ.	4 OZ. LIQUID VENEER												
✓ 12 DOZ.	12 OZ. LIQUID VENEER										3.84	46.08	
DOZ.	LV MOPS	DOZ. 101	DOZ. 102										
DOZ.	LV MOPS	DOZ. 201	DOZ. 202 DOZ. 206										
• DOZ.	LV MOPS	DOZ. 301	DOZ. 302 DOZ. 306										
DOZ.	CHAMPION SIZE	DOZ. OIL	DOZ. DRY DOZ. DUSTERS										
DOZ.	2 1/4 OZ. TUBES RATNIP												
DOZ.	4 OZ. TUBES NEVERLEAK TIRE FLUID												
DOZ.	8 OZ. CANS PURGO RADIATOR CLEANER												
DOZ.	9 OZ. CANS RADIATOR NEVERLEAK												
SHIPPED FROM WAREHOUSE AT SAN FRANCISCO, CALIF.													

**TOTAL OF THIS INVOICE**

46.08

ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 30 DAYS FROM RECEIPT OF GOODS

510127

# INVOICE

ALCOHOL DISTILLED PATENTS 1 681 010 AND 1,716 827 OTHER PATENTS PENDING—AMLO SALTWORKS CO., LTD., WILKIN FALLS B. C.



# LIQUID VENEER CORPORATION

310 Elliott Street  
Buffalo, New York  
RECEIVED Household and Automotive Specialties

RECEIVED PAYMENT  
FEB 5 1932  
HOFFMAN HARDWARE CO.

Sold to HOFFMAN HARDWARE COMPANY,  
229-35 30. LOS ANGELES ST.  
LOS ANGELES, CALIF.

SHIP TO  
137  
VIA L A S S CO FRT. ALLOWED

O. K.

INVOICE DATE

JAN 26 1932

Priced Out

TERMS—CASH, Less 2% in 10 Days—30 Days Net

ORDER REC'D	1/9/32	DATE ENTERED	1/11/32	ENTERED BY	S	SHIP FROM	W	BUYER	1701	SALES- MAN	16- M	CLASS	W
Quantity		DESCRIPTION								Net Per Doz.	TOTAL		
✓ 12	DOZ.	4 OZ. LIQUID VENEER								1.92	✓	23.04	
✓ 12	DOZ.	12 OZ. LIQUID VENEER								3.84	✓	46.06	
	DOZ.	LV MOPS	DOZ. 101	DOZ. 102									
	DOZ.	LV MOPS	DOZ. 201	DOZ. 202		DOZ. 206							
	DOZ.	LV MOPS	DOZ. 301	DOZ. 302		DOZ. 306							
	DOZ.	CHAMPION SIZE	DOZ. OIL	DOZ. DRY		DOZ. DUSTERS							
	DOZ.	2 1/4 OZ. TUBES RATNIP											
✓	DOZ.	4 OZ. TUBES NEVERLEAK TIRE FLUID								1-23-3 ✓ HOLD			
	DOZ.	8 OZ. CANS PURGO RADIATOR CLEANER											
✓	DOZ.	9 OZ. CANS RADIATOR NEVERLEAK											
2	ONLY	SUCCESS DEALS- NEVERLEAK GASKET SHELLAC .80								466			
										@ PER EACH		4.86	
										3.75		9.72	
SHIPPED FROM WAREHOUSE AT SAN FRANCISCO, CALIF.										JAN 20 1932			

TOTAL OF THIS INVOICE

78.84

ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 30 DAYS FROM RECEIPT OF GOODS

2205

INVOICE

REGISTERED—UNLAWFUL TO COPY—1,000,000 AND 1,750,000 OTHER PATENTS PENDING—H. H. SALTSBERG CO., LTD., NEW YORK, N. Y.



# SHIPPED LIQUID VENEER CORPORATION

RECEIVED

311 Allicott Street

Buffalo, New York

Household and Automotive Specialties

RECEIVED  
PAYMENT  
NOV 22 1932

HOFFMAN HARDWARE CO.

Sold to: HOFFMAN HARDWARE CO.,  
299-35-8 LOS ANGELES ST.,  
LOS ANGELES, CALIF

SHIP TO: 13-7  
VIA HASLETT WHSE- LOS ANGELES SS LINE  
STORE DOOR DELV. SERVICE & CITIZENS  
F O B BUFFALO TRUCK  
TERMS—CASH, Less 2% in 10 Days—30 Days Net

INVOICE DATE NOV -8 1932

ORDER REC'D	DATE ENTERED	ENTERED BY	SHIP FROM	BUYER	SALES MAN	CLASS
11-4-32	11-4-32	LL	W	10303	10-P	W
Quantity	DESCRIPTION				Net Per Doz	TOTAL
DOZ.	4 OZ. LIQUID VENEER					
DOZ.	12 OZ. LIQUID VENEER					
DOZ.	LV MOPS	DOZ. 101	DOZ. 102			
DOZ.	LV MOPS	DOZ. 201	DOZ. 202	DOZ. 306		
DOZ.	LV MOPS	DOZ. 301	DOZ. 302	DOZ. 306		
DOZ.	CHAMPION SIZE	DOZ. OIL	DOZ. DRY	DOZ. DUST		
DOZ.	2 1/2 OZ. TUBES RATNIP					
DOZ.	4 OZ. TUBES NEVERLEAK TIRE FLUID					
DOZ.	8 OZ. CANS PURGO RADIATOR CLEANER					
DOZ.	8 OZ. CANS RADIATOR NEVERLEAK					
15 ONLY	HAMMOND ELEC. ALARM CLOCK DEALS - L.V. @ PER EA.				7.68	115.20
	TO CONTAIN 2 DOZ. 4 OZ. L.V.					
	1 DOZ. 12 OZ. L.V.					
	1 HAMMOND ELEC. CLOCK					
15 ONLY	HAMMOND ELEC. ALARM CLOCKS, NO CHARGE					
	SHIPPED FROM OUR WAREHOUSE AT SAN FRANCISCO, CALIF					

TOTAL OF THIS INVOICE

115.20

ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 30 DAYS FROM RECEIPT OF GOODS

3701

INVOICE



REGISTERED—REGISTERED—PAT. 270, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100





RECEIVED LOWY VENEER CORPORATION

RECEIVED

SHIP TO

375 Elliott Street

Buffalo, New York

Sold to

HOFFMAN HARDWARE CO.,  
229 SO. LOS ANGELES  
LOS ANGELES, CALIF

SHIP TO

137

ALREADY SHIPPED - BASKETT WHSE  
FRT ALLOWED

INVOICE DATE

JAN 10 1933

O.K.  
Priced Out

CASH, -30 Days Net -2% 10 DAYS

JAN 20 PAID  
HOFFMAN HARDWARE CO.

ORDER REC'D 1-10-33 DATE ENTERED 1-10-33 ENTERED BY LL SHIP FROM W BUYER SALES MAN 10-70 CLASS

Quantity	DESCRIPTION	Net Per Doz.	TOTAL
DOZ.	4 OZ. LIQUID VENEER		
DOZ.	12 OZ. LIQUID VENEER		
DOZ.	2 1/4 OZ. TUBES RATNIP		
DOZ.	4 OZ. TUBES NEVERLEAK TIRE FLUID		
DOZ.	8 OZ. CANS PURGO RADIATOR CLEANER		
DOZ.	9 OZ. CANS RADIATOR NEVERLEAK		
2 DOZ.	QUARTS LIQUID VENEER	8.00	16.00
✓ 4 ONLY	SUCCESS DEALS-NEVERLEAK GASKET SHELLAC @ PER EA.	4.86	19.44
✓ 1 ONLY	BIG GIANT DEAL - NEVERLEAK TIRE FLUID @ PER EACH	14.40	14.40

1-10-33

283  
LAK

104# @ .72  
144# @ .53  
274# @ .63

charged back  
1/25/33  
n.b.3

SHIPPED FROM OUR WAREHOUSE AT SAN FRANCISCO, CAL

TOTAL OF THIS INVOICE

49.84

ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 30 DAYS FROM RECEIPT OF GOODS

D 0367

INVOICE

CONTINUOUS TRADE MARK - INTERPOLIC 575 MM 5/12/33 MODEL CO. LTD. HIRABARA PALLA S.T.



Buffalo, New York

**Sold to**

HOFFMAN HARDWARE  
LOS ANGELES, CALIF.

## SHIP TO

**INVOICE DATE**

JAN 30 1934

**TERMS—CASH,—30 Days Net**

**2% 10 DAYS**

ORDER REC'D	DATE ENTERED	ENTERED BY	SHIP FROM	BUYER	SALES MAN	CLASS
1-20-34	2-30-34					5-W
Quantity	DESCRIPTION				Net Per Doz.	TOTAL
✓ 6 DOZ.	4 OZ. LIQUID VENEER				1.92	✓ 11.52
✓ 4 DOZ.	12 OZ. LIQUID VENEER				3.84	✓ 15.36
DOZ.	2 1/4 OZ. TUBES RATNIP					
DOZ.	4 OZ. TUBES NEVERLEAK TIRE FLUID					
DOZ.	8 OZ. CANS PURGO RADIATOR CLEANER					
DOZ.	8 OZ. CANS RADIATOR NEVERLEAK					
✓ 2 ONLY	SUCCESS DEALS- M. L. GASKET SHELLAC @ PER EA.				4.86	✓ 9.72
✓ 1 ONLY	BIG GIANT DEAL- NEVERLEAK TIRE FLUID @ PER EA.				14.40	✓ 14.40
<p>JOHN A</p> <p>1.25 used 148 Grand total</p> <p>SHIPPED FROM OUR WAREHOUSE AT SAN FRANCISCO, CAL</p>						

SHIPPED FROM OUR WAREHOUSE AT SAN FRANCISCO, CAL

TOTAL OF THIS INVOICE

51.00

**ALL CLAIMS FOR SHORTAGE MUST BE MADE WITHIN 30 DAYS FROM RECEIPT OF GOODS**

D11878

# INVOICE

[illegible]



# “AFFIDAVIT OF ISADOR I. SMUCKLER

STATE OF CALIFORNIA                    )  
COUNTY OF LOS ANGELES        ) SS

Isador I. Smuckler being first duly sworn on oath, deposes and says:

That he is one of the attorneys of record for the plaintiff in the above entitled case; that as a part of the preparation for the hearing on the motion to dismiss in this case, which is set for Monday, July 29th, 1935, before the Honorable George W. Cosgrave, affiant and Harry Graham Balter, Esquire, the other attorney of record for plaintiff, determined that the veracity of the various ex-parte affidavits which had heretofore been filed in connection with the original motion to dismiss and quash on behalf of the defendant and which were subsequently again used on behalf of the defendant at the time of the trial in this cause on May 8th, 9th and 10th, 1935, should be personally checked by interviewing those who had made the affidavits; that for this purpose, affiant made a special trip to San Francisco and on July 16th, 1935, your affiant had a conversation with one J. W. Howell, secretary of the Haslett Warehouse Company, which conversation took place in the office of the Haslett Warehouse Company in San Francisco; that the said J. W. Howell is the same J. W. Howell who signed an affidavit on the 1st day of February, 1934, for and on behalf of the defendant in this action, which affidavit is on file in the records of the above entitled action; that affiant informed said J. W. Howell that he believed the information set forth in the aforementioned affidavit of J. W. Howell and similar affidavits signed by John Brash, superintendent of said Haslett Warehouse Company, W. G. Heiss in charge

of the office and the clerical work and records of said warehouse company and George Savage, sometimes employed as a substitute for said W. G. Heiss, were not true and did not reflect the true method of handling the products of the Liquid Veneer Corporation at or about the time of the institution of the above mentioned suit or at any time previous or subsequent thereto; that during said conversation, affiant discussed with the said J. W. Howell his affidavit hereinabove mentioned as well as the affidavits of John Brash and George Savage wherein the said J. W. Howell told your affiant that said affidavits did not reflect the true situation and that some of the statements therein were false and untrue, when as a matter of fact said affidavits should have stated that the Liquid Veneer Corporation during all times herein mentioned and particularly at the time of the institution of the above entitled action, maintained a stock of merchandise with the Lawrence Warehouse Number 19, in the City of San Francisco, California, which warehouse is now known as the Humboldt Warehouse of the Haslett Warehouse Company, for the purpose of filling orders of customers on the accredited list, and that any of said accredited customers of the Liquid Veneer Corporation, doing business in California, particularly in the Southern District thereof and in and around Los Angeles, were permitted to communicate with said warehouse company and place an order for various amounts of merchandise without previous order or instructions from the Liquid Veneer Corporation at Buffalo, New York, having first been received, which was the usual practice and method of handling the merchandise for the said Liquid Veneer Corporation and after which the said Haslett Warehouse Company would inform the said Liquid Veneer Corporation of the delivery and sale of



such merchandise; that the merchandise came in carload lots and a sufficient amount of stock of the said Liquid Veneer products was always maintained on hand for the purpose of filling orders sent in by one E. C. Mack, the California representative of Liquid Veneer Corporation and for the purpose of protecting their own warehouseman lien for storing and handling such products; that at the time the aforementioned affidavits were signed by the said J. W. Howell, W. G. Heiss, George Savage and John Brash, the firm of Gibson, Dunn & Crutcher were the attorneys of record for said defendant and that the said J. W. Howell further stated to me that on June 8th, 1932, he addressed a letter to the attention of Norman S. Sterry, Esquire, of the firm of Gibson, Dunn & Crutcher, the office copy of which letter was exhibited to your affiant, setting forth in said letter that the affidavits hereinbefore mentioned did not reflect the true situation of the handling of the products of said Liquid Veneer Corporation and that most of the statements therein with reference thereto were false and untrue when as a matter of fact a stock of merchandise was always maintained on hand for the Liquid Veneer Corporation, which merchandise was used for the purpose of filling future orders and that subsequent to the receipt of said letter the said Norman S. Sterry, made a special trip to San Francisco and had a special conference with the said J. W. Howell with reference thereto and immediately after said conference the said Norman S. Sterry and the firm of Gibson, Dunn & Crutcher withdrew as attorneys for the defendant in said action; that the said J. W. Howell and affiant then went to the warehouse of said Haslett Warehouse Company at the corner of Second and Brannan, in the City of San Francisco, at which place, a conference was had be-

tween the said J. W. Howell and John Brash and your affiant, at which time all the records maintained for the account of the said Liquid Veneer Corporation were exhibited to your affiant and after discussing the same, the said J. W. Howell instructed the said John Brash to sign any affidavit that your affiant would direct without reservation provided the same now reflected the true facts of the method of handling said products at the time of the institution of this suit and the service of process upon defendant Liquid Veneer Corporation; that said records were too numerous to set forth in any affidavit but that information from several of the records thereof are more particularly set forth in the affidavit of John Brash signed on July 18th, 1935 and filed herein; that the said J. W. Howell was immediately thereafter leaving for San Diego, California and that there was not sufficient time to prepare an affidavit for him to sign which is the reason that this affiant herein is setting forth the facts above stated.

ISADORE I. SMUCKLER

Subscribed and Sworn to before me this 25th day of July, 1935

JOSEPH H. WEISMAN

Notary Public in and for said County and State."

On said 29th day of July, 1935, the hearings upon said Motions were continued to the 3rd day of September, 1935, by reason of the absence of the Trial Court, Hon. Geo. Cosgrave. On said 3rd day of September, 1935, the hearings upon said Motions were continued to the 9th day of September, 1935.

On August 14, 1935, plaintiff, in further reply to the Brief of defendant and its Motion to Dismiss, filed the affidavit of J. W. Howell, which is as follows, to-wit:

“AFFIDAVIT OF J. W. HOWELL

STATE OF CALIFORNIA )  
CITY AND COUNTY OF ) SS.  
SAN FRANCISCO. )

J. W. HOWELL, being first duly sworn upon his oath, deposes and says:

That he is the same J. W. Howell who on the 1st day of February, 1934, filed an affidavit in this case in connection with the Motion to Quash Service of Summons made herein by the defendant Liquid Veneer Corporation; that for many years last past, affiant has been the secretary of the Haslett Warehouse Company doing business as a warehouseman in the City of San Francisco; that on the 1st day of January, 1932, the Haslett Warehouse Company took over the warehouses and business of the Lawrence Warehouse Company, that up to that time had been doing a similar warehouse business in San Francisco, taking over among other things the business and possession of a warehouse at the corner of Brannan and Second Street in said city, up to that time known as “Lawrence Warehouse 19” now known and designated as “Humboldt” warehouse of the Haslett Company.

That at the time the Haslett Company took over said warehouse John (Jack) Brash was the superintendent in charge, W. G. Heiss was in charge of the office and the clerical work and records and George Savage was employed in various capacities and as a substitute for Mr. Heiss in case of his absence from the office; that said

named persons were continued in their several capacities as employees of the Haslett Warehouse Company and all except Savage have ever since maintained their respective positions.

That the business conducted by said warehouses is a general warehouse business of storing and shipping various articles of merchandise which may come into its possession by said customers or patrons.

That affiant knows, and at all times herein mentioned has known of the business concern, Liquid Veneer Corporation of Buffalo, New York and that during all of said time up to and until May 4th, 1932 said Liquid Veneer Corporation has maintained an account with said warehouse companies and maintained a stock of merchandise therewith.

That on or about May 4th, 1932, said account and merchandise was transferred as of February 1st, 1932, to the G. A. Hosmer Co. in which last mentioned name account has remained, until April 18th, 1935, at which time said G. A. Hosmer Co. instructed said Haslett Warehouse Co. to ship all of its Liquid Veneer products merchandise out of the state.

That at all times herein mentioned, said Liquid Veneer Corporation or G. A. Hosmer Co. has maintained with said Lawrence Warehouse Company and said Haslett Warehouse Co. as the case may be, a stock of merchandise which would be stored in said warehouses until:

- (1) Orders were received to fill any order sent in by said Liquid Veneer Corporation or said G. A. Hosmer Co.

- (2) Local customers, which were on the accredited list of said Liquid Veneer Corporation or G. A. Hosmer

Co. would call said warehouse companies and request various amounts of such merchandise to be delivered without direct order from Liquid Veneer Corporation after which the said warehouse companies would inform the said Liquid Veneer Corporation or G. A. Hosmer Co. as the case may be of the request for and delivery of such merchandise, to said accredited customers.

That said Liquid Veneer Corporation or G. A. Hosmer Co. would ship to said warehouses carload quantities of its merchandise, part of which was stored until sold, which took from one month to two years or more, to-wit:

(1) On September 8th, 1931, there was on hand in said warehouse 2 cases of 12 gross each of such merchandise from a particular shipment which was disposed of by orders at various times and dates up to and until May 18th, 1935.

(2) On February 3rd, 1930, said warehouse had on hand 23 cases and 14 dozen of merchandise from a particular shipment of said Liquid Veneer Corporation which was afterwards sold at various times and dates up to May 1st, 1932, when balance of said merchandise was ordered shipped out on order of G. A. Hosmer Co.

(3) On January 16th, 1932, said warehouse had on hand 11 cases of merchandise from a particular shipment of said Liquid Veneer Corporation which was afterwards sold at various times and dates up to March 12th, 1934, at which time there was left of said lot or shipment of merchandise 7 cases thereof and on January 24th, 1935, said 7 cases were delivered on order of G. A. Hosmer Co. That such statements of shipments and the dates and methods of delivery of said merchandise are taken from the permanent records of said warehouses which are too

numerous to set forth herein, all of which are typical of said records hereinabove set forth and which reflect the method or methods of handling, delivering or storing the merchandise of said Liquid Veneer Corporation.

That on May 4th, 1932, the said Haslett Warehouse Company received a letter dated April 30th, 1932 from the Liquid Veneer Corporation instructing said warehouse Company *received a letter dated April 30th, 1932 from the Liquid Veneer Corporation instructing said warehouse company* to transfer all merchandise and records to the account of G. A. Hosmer Co. Effective as of February 1st, 1932 and make all future shipments and bills for the account of G. A. Hosmer Co.

That no merchandise was ever received from said Liquid Veneer Corporation or G. A. Hosmer Co. on consignment basis, but was at all times received for storage to be held until such time as future sale orders were received for same which in some instances such orders were not received for as long as 2 years thereafter.

That affiant personally knows and has examined all of the records of the Lawrence Warehouse Company which conducted the warehousing of the Liquid Veneer merchandise up to the time that the Haslett Warehouse Company took over the Lawrence Warehouse Number 19 and that affiant knows that these records which are too cumbersome and numerous to attach to this affidavit fully reflect the statements herein made.

That the foregoing is a true statement of the method or methods used by the Lawrence Warehouse Company Number 19, now known as the Humboldt Warehouse of the Haslett Warehouse Co. in receiving, handling, storing



and shipping the merchandise of the said Liquid Veneer Corporation and G. A. Hosmer Co.

This affidavit is given pursuant to a subpoena and subpoena duces tecum issued July 13th, 1935, in the above entitled matter and served upon the said Haslett Warehouse Co.

J. W. HOWELL

Subscribed and Sworn to before me this 9th day of July, 1935.

AMY B. TOWNSEND

Notary Public in and for said County and State."

On the 7th day of September, 1935, defendant filed its written withdrawal of its Motion to Dismiss.

On said 9th day of September, 1935, said motions were regularly called on the calendar for hearing. Defendant made oral motion for an order withdrawing the Motion to Dismiss and which motion was granted and order made. Defendant made oral motion for order striking from the files the affidavits of John Brash, Byron Jack Badham, Jr., Isador I. Smuckler and J. W. Howell, and filed by plaintiff in opposition to said Motion to Dismiss, on the ground that said affidavits were incompetent, irrelevant and immaterial and said Motion to Dismiss having been withdrawn and the Court having so ordered there was nothing before the Court at the hearing to which all or any of said affidavits could or did refer or pertain, and which Motion to Strike was denied and exception noted for defendant.



The Motion for New Trial was argued. The point was particularly urged that the Court at no time had nor has jurisdiction over defendant, a foreign corporation, by reason of the failure of the plaintiff to comply with the requirements of Section 406a of the Civil Code of the State of California; that process directed to a foreign corporation may be served on the Secretary of State when, and only when, the person designated as its agent for service of process cannot be found at the address given with due diligence, or if no such person has been designated and neither its President or other head of the corporation, a Vice-President, Secretary, Assistant-Secretary, or General Manager in the State can be found after diligent search, the records and files in this case failing to show at any time prior to the service of summons on the Secretary of State of the State of California for the defendant that no person to accept service of process had been designated or that any one of said aforementioned officers or agents of the corporation could not be found after diligent search.

After submission, the Court, on September 27, 1935, denied said Motion for New Trial without comment or opinion.

## ORDERS EXTENDING TERM OF COURT

On the 14th day of August, 1935, an order was made and filed extending the term of the Court in which the judgment herein was entered to and including the 9th day of September, 1935; on the 3rd day of September, 1935, at the time of the calling upon the calendar of the hearings upon the defendant's Motion to Dismiss and Motion to Vacate and Set Aside Verdict and to Grant New Trial, an order was made in Open Court and recorded in the Minutes of the Clerk that the term of the Court in which

the Judgment herein was entered be extended to and including the 9th day of September, 1935, and to which date the hearings upon said Motions were also continued; on the 9th day of September, 1935, an order was made and filed extending the term of Court in which the Judgment herein was entered to and including the 1st day of November, 1935; on the 3rd day of October, 1935, an order was made and filed extending the term of Court in which Judgment herein was entered to and including the 15th day of January, 1936, and extending the time within which the Bill of Exceptions in this cause may be served and filed, to and including said 15th day of January, 1936.

#### SUBSEQUENT SUBSTITUTION OF ATTORNEYS

On the 14th day of June, 1935, BICKSLER, PARKE & CATLIN and PAUL V. SHEEHAN were substituted as attorneys for defendant in place of Paul V. Sheehan, Esq.

The foregoing Bill of Exceptions contains all the material evidence offered and received on the trial of said cause, including all rulings made during the course of the trial which were excepted to by the defendant and exceptions allowed by the Court.

BICKSLER, PARKE & CATLIN  
PAUL V. SHEEHAN

BY W G Danielson  
Attorneys for defendant and Appellant.

The foregoing bill of exceptions is allowed and settled this Dec. 18, 1935.

Geo. Cosgrave  
Judge

## ORDER SETTLING BILL OF EXCEPTIONS

It appearing to the Court that the defendant herein has filed in this Court its proposed Bill of Exceptions in this cause, together with the Admission of service of counsel for the plaintiff of a copy of said proposed Bill of Exceptions and of a copy of Notice of the filing of the same and of Notice of the date of the hearing for the settlement of the same, and

It further appearing that the plaintiff has filed her proposed amendments to said Bill of Exceptions and that it has been redrafted and now includes such of the proposed amendments as are material in this appeal and as directed by the Court, and the same being duly presented to the undersigned pursuant to Notice duly given and the same having been duly considered by the Judge of this Court who presided at the trial of this cause, and the same appearing to contain all of the material evidence, the complete charge of the Court to the jury, the exceptions taken by defendant, and to be in all respects complete and proper, and having been prepared, served, lodged with and presented to the Court during the term in which the Judgment in this cause was entered as extended by orders of the Court made during said term and while the Court had the jurisdiction to make the same, and during the term in which defendant's motion for a new trial was denied and which motion for a new trial was filed and entertained by this Court during the term in which the judgment herein was entered, and

The plaintiff having made a motion to strike the Bill of Exceptions proposed by the defendant and opposing the settlement of the same having been considered by the Court and found to be without merit,

IT IS ORDERED AND DECREED that the plaintiff's motion to strike the proposed Bill of Exceptions and her opposition to the settling of the same be and the same is hereby overruled and denied, and

IT IS ORDERED AND CERTIFIED that the above and foregoing instrument denominated Bill of Exceptions and comprised of pages 1 to 166 inclusive, be and the same is hereby approved, settled and allowed in the term of Court in which the Judgment herein was entered as duly and regularly extended and in the term of Court in which the defendant's motion for new trial was denied and which motion was filed and entertained during the term in which the judgment herein was entered, as the Bill of Exceptions in the above entitled cause.

Done at Los Angeles, California, this 19th day of December, 1935.

BY THE COURT:

Geo. Cosgrave  
Judge.

[Endorsed]: Lodged Dec 2-1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk. Filed Dec 19 1935 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

MOTION TO STRIKE PROPOSED BILL OF EX-  
CEPTIONS AND OPPOSITION TO SETTling  
OF SAME.

COMES NOW the plaintiff by her attorney Harry Graham Balter and moves to strike the proposed Bill of Exceptions and opposes the settling of same upon the following grounds:

I.

This Court has lost jurisdiction to settle the proposed Bill of Exceptions.

II.

The proposed Bill of Exceptions should have been settled during the term within which the judgment was rendered or within such time as is provided by the rules of the United States District Court for the Southern District of California, or within such time as the term was extended by order of Court for the specific purpose of settling the Bill of Exceptions.

DATED this 12th day of December, 1935.

Harry Graham Balter  
Attorney for Plaintiff

## POINTS AND AUTHORITIES

## I.

The Bill of Exceptions must be settled during the term within which the judgment was rendered.

Davis vs U. S. 67 Fed. 2nd 739;

Ritter vs Gulf etc. Ry. Co. 56 Fed. 2nd 369;

Walton vs Southern Pacific Co. 53 Fed. 2nd 63  
at 68.

## II.

The term may be extended by order of Court if the order specifically extends the term for the purpose of settling the Bill of Exceptions.

Bertino vs Marion Steam Shovel Co. 10 Fed.  
Supp. 354, 355; (reasoning of court affirmed in  
76 Fed. 2nd 462);

Exporters of Manufacturers Products vs Butter-  
worth-Judson Company, 258 U. S. 365, 60 L. E.  
D. 663.

## III.

Retention of jurisdiction by the District Court beyond the term can be for specified purposes only.

Bertino vs Marion Steam Shovel Co. 10 Fed.  
Supp. 354, 355; (reasoning of court affirmed in  
76 Fed 2nd 462);

Exporters of Manufactuers Products vs Butter-  
worth-Judson Company, 258 U. S. 365, 60 L. E.  
D. 663.

## IV.

An order extending the term for the purpose of filing a motion for new trial does not extend the term for the purpose of filing and settling a Bill of Exceptions.

Bertino vs Marion Steam Shovel Co. 10 Fed. Supp. 354, 355; (reasoning of court affirmed in 76 Fed. 2nd 462);

United States District Court rules for Southern District of California rule 49.

## V.

Rule XI of the Rules of the District Court for the Southern District of California, does not automatically extend the term for the purpose of filing a Bill of Exceptions for the period of three months beyond the expiration of the term, but only for a period of three months beyond the first Tuesday subsequent to the rendering of the judgment.

## VI.

There are no extraordinary circumstances here which justify any *relation* of these well established rules.

RESPECTFULLY SUBMITTED:

Harry Graham Balter  
ATTORNEY FOR PLAINTIFF.

[Endorsed]: Received copy of the within Motion this 12th day of Dec. 1935. Bicksler, Parke & Catlin, Attorneys for Def. Filed Dec. 12, 1935 R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.



[TITLE OF COURT AND CAUSE.]

POINTS AND AUTHORITIES OF DEFENDANT  
IN OPPOSITION TO MOTION OF PLAINTIFF  
TO STRIKE PROPOSED BILL OF EXCEP-  
TIONS, AND IN SUPPORT OF ORDER SET-  
TLING THE SAME.

I.

The time for settling and signing a Bill of Exceptions is extended by the filing of a motion for a new trial or by any proceeding that challenges the finality of the judgment of the trial Court. If such motion is filed during the term when judgment is entered the Bill of Exceptions may be settled during the term at which the motion is denied although that term is subsequent to the term at which the judgment was entered, and no order extending time in which to serve and file Bill of Exceptions need be made.

MISSOURI K. & T. RAILWAY CO., V. RUSSELL, 60 Fed. 501, (C. C. A. 8);

U. S. V. CARR, 61 Fed. 802, (C. C. A. 8);

WOODS V. LINDVALL, 48 Fed. 73, (C. C. A. 8);

TULLIS V. LAKE ERIE, ETC., 105 Fed. 554 (C. C. A. 7);

MAHONING VALLEY RAILWAY V. O'HARA, 196 Fed. 945 (C. C. A. 6);

"The judgment was rendered at the October 1910 term. No order settling a Bill of Exceptions or providing time therefor was made at that term; but a motion for a new trial was made, submitted and its decision continued until

the next term. At the next term, the motion for new trial was denied, and a time given to settle a Bill, within which time, as extended, the Bill was settled. It is well understood, as a primary rule, that exceptions at the trial must be reduced to form and made a part of the record during the term at which judgment is rendered (*Muller v. Ehlers*, 91 U. S. 249, 23 L. Ed. 319); but it is also settled that the judgment is not finally entered, so as to be beyond the control of the Court at a later term, until a pending motion for new trial is denied. (*Kingman v. Western Mfg. Co.*, 170 U. S. 675, 42 L. Ed. 1192, *In Re: McCall*, (C. C. A. 6) 145 F. 898). 'The considerations which lead to this latter result are applicable here. It would be a vain thing to settle a Bill of Exceptions upon a judgment still contingent; and we are clear that the Court had full power over this subject during the remainder of the term at which the motion for new trial was decided. It follows plaintiff in error is entitled to be heard upon all its assignments.'

CAMDEN IRON WORKS V. SATER, 223 Fed.  
611 (C. C. A. 6);

SLIP SCARF V. FILENES SONS CO., 289  
Fed. 641 (C. C. A. 1);

MOORE GROCERY CO., V. PACIFIC R. M.,  
296 Fed. 828 (C. C. A. 8);

Verdict returned and judgment entered in May Term. Motion for new trial filed in same term. Overruled in October term. Bill of Exceptions approved in October Term and on the next day after overruling motion for new trial.

"It has long been the rule in this and other Circuit Courts that a Bill of Exceptions is presented in time if it is presented for allowance at the term at which the motion for a new trial is determined, although that term is subsequent to the term at which the trial was had and judgment entered, if the motion for new trial was filed at the trial term, and the hearing of it was continued by the Court to a subsequent term. (Citing 48 F. 73; 60 F. 501; 61 F. 802; 98 F. 222; 105 F. 554; 196 F. 945; 223 F. 611)."

U. S. SHIPPING BOARD V. GALVESTON  
DRYDOCK, 13 Fed. (2nd) 607 (C. C. A. 5);

Judgment entered January 22, 1925. On January 26th motion for new trial filed. Overruled July 14, 1925, during next term. Bill of Exceptions signed July 17, 1925.

"There is no merits in the plaintiff's motion to strike the Bill of Exceptions which was signed during the term at which the motion for new trial was overruled. The time for signing the Bill of Exceptions and suing out a Writ of Error did not begin to run until the Court acted on the motion for a new trial. Texas Pac. Ry. Co., vs Murphy, 111 U. S. 488, 28 L. Ed. 492."

GREAT NORTHERN LIFE INS. CO., V.  
DIXON, 22 Fed. (2nd) 655 (C. C. A. 9);

SHALLAS V. U. S., 37 Fed. (2nd) 693 (C. C.  
A. 9);

“In his petition for rehearing, the appellant contends that a motion for a new trial was pending at the time of the final adjournment for the term, and that this motion carried the case over beyond the term for the purpose of settling a Bill of Exceptions, as well as for the purpose of disposing of the motion for a new trial. This contention is no doubt well supported by authority. 48 F. 73; 98 F. 222; 105 F. 554; 160 F. 34; 196 F. 945; 289 F. 641; 296 F. 828; 13 F. (2nd) 607.”

MARION STEAM SHOVEL CO., V. REEVES,  
76 Fed. (2nd) 462 (C. C. A. 8).

## II.

The Bill of Exceptions may be approved by the trial Court though not filed within the time specified by the District Court rule if jurisdiction over the case has not been lost by the trial court.

RUSSO-CHINESE BANK V. NATIONAL  
BANK OF COMMERCE OF SEATTLE, 187  
Fed. 80 (C. C. A. 9);

TWOHY BROS. V. KENNEDY, 295 Fed. 462,  
C. C. A. 9;

SPOKANE INTERSTATE V. FIDELITY DE-  
POSIT CO., 15 Fed. (2nd) 48, (C. C. A. 9);

PUGET SOUND FINANCE V. NELSON, 41  
Fed. (2nd) 356, (C. C. A. 9);

“Counsel moved to strike Bill of Exceptions because not filed within time prescribed by rules of the Court below. Whether the time for filing the Bill of Exceptions was extended by the pendency of a motion for new trial, we need

not inquire, because the Bill was filed and settled during the term, and whether the local rule was followed or not is not controlling. (Citing cases.)”

HOWARD V. LOUISIANA & A. RAILWAY  
CO., 49 Fed. (2nd) 571, (C. C. A. 5).

Appellant did not file Bill of Exceptions within the forty-two days allowed by order in which to prepare and settle his Bill. Appellee contends the Court had no jurisdiction to allow, approve and order Bill of Exceptions. The Court states:

“The point is without merit. That the preliminary order granting forty-two days has no effect upon the inherent power of the Court at any time during the term to allow, approve, and order filed bills of exceptions is too elementary to require citation of authorities. The motion to strike is overruled.”

In Re: MORRISSEY, 67 Fed. (2nd) 267 (C. C.  
A. 9);

STANTON V. EMBRY, 93 U. S. 548; 23 L. Ed.  
983;

Respectfully submitted.

BICKSLER, PARKE & CATLIN  
PAUL V. SHEEHAN

BY W G Danielson

Attorneys for defendant and Appellant.

[Endorsed]: Received copy of the within Points & Authorities this 16 day of Dec. 1935 H. G. Balter, attorney for Pl. Filed Dec. 16, 1935. R. S. Zimmerman, Clerk By Robert P. Simpson, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

TO THE HONORABLE GEO. COSGRAVE, JUDGE  
PRESIDING AT THE TRIAL OF THE ABOVE  
ENTITLED COURT:

Comes now W. G. Danielson and respectfully represents:

That he is the attorney in the office of Bicksler, Parke & Catlin, the attorneys in the City of Los Angeles representing the defendant herein, the associate counsel, Paul V. Sheehan, being an attorney of the State of New York, to whom the above entitled cause was referred for the purpose of taking all such steps as may be necessary in order to preserve all rights of the defendant for the making of a motion for a new trial in this proceeding and for preserving the record so that should said motion for new trial be denied that an appeal of this action could be taken to the Circuit Court of Appeals and which appeal would be upon all of the features of and evidence pertaining to this action; that your affiant promptly thereupon examined the rules, statutes and decisions pertaining to and affecting the making of such motion for new trial and the preserving of the record in order that an appeal may be effectively taken should said motion for new trial be denied, the time within which said motion for new trial must be filed and entertained, the time within which an appeal must be taken, the time within which Bill of Exceptions must be served, filed and settled, and the other steps that must be taken to preserve the record for the defendant.

That upon such investigation the Manual of Federal Appellate Procedure of Paul P. O'Brien was consulted

and at page 31 thereof it was ascertained that "the time for the presentation of a Bill of Exceptions runs from the determination of a motion for new trial, providing the motion was filed at the trial term and the hearing continues by the Court to the subsequent term."; the recent work (1935) by Marker on Federal Appellate Procedure was examined and it was there ascertained that "the time for settling and signing the Bill of Exceptions is extended by the filing of a motion for new trial or by any proceeding that challenges the finality of the judgment of the trial Court. If such a motion is filed during entry -- or before right to present and settle the Bill has been lost, the Bill may be settled during the term at which the motion is denied, although that term is subsequent to the term at which the judgment was entered"; Rule 49 of this Honorable Court was consulted and a decision was sought determining whether the phrase in said Rule, "after the entry of the judgment or order", referred to the entry of the judgment immediately after the verdict of the jury or the judgment as it became final after proceedings upon motion for new trial had been completed. No case of the Circuit Court of Appeals for the Ninth Circuit was found construing said Rule of Court. The case of SLIP SCARF CO., V. FILENES SONS CO., 289 Fed. 641 (C. C. A. 1) was found and in which the Rule of the District Court required Bill of Exceptions to be filed within twenty days after the verdict of the jury. In said case the Bill of Exceptions was not filed within twenty days after the verdict of the jury and in fact was not filed until the term following the term wherein judgment was rendered because of the pendency of a motion for new trial. In said case the Court stated:



“According to the letter of the rule, a bill of exceptions is to be filed within 20 days after the verdict of the jury. But where a motion for a new trial is interposed, the verdict, as well as any judgment that may have been entered thereon, becomes contingent until the motion has been passed upon and determined. Until then it cannot be known that there is any occasion for filing a bill of exceptions, and this being so, no good reason can exist for saying that the time for doing so has begun to run or is past. It has been the practice in this Circuit, as well as in other circuits, to allow bills of exceptions to be filed within 20 days from the denial of a motion for a new trial and to allow an extension of time for this purpose, if applied for within the twenty days.”;

that upwards of ten cases from various Circuit Courts were examined and all of which held that a motion for new trial filed during the term when judgment is entered extends the time for the filing and settling of a Bill of Exceptions to the term in which said motion is overruled although that term be subsequent to the term at which judgment was entered, and a list of which cases has been respectfully submitted to the Court upon the hearing for the settlement of the Bill of Exceptions; that decisions of the Supreme Court of the United States were examined as to the affect of the filing of a motion for new trial and were found to hold that the judgment or decree does not take final effect for the purposes of Writ of Error or Appeal until the motion for a new trial or petition for rehearing has been determined and until the judgment or decree

becomes final the trial Court has jurisdiction over the same; that the Circuit Court of Appeals for this circuit in the cases cited to the Court in the Memorandum filed in support of settling the Bill of Exceptions has held that so long as the Bill of Exceptions is settled in the term of Court in which the judgment was entered, or an extension thereof, the same is sufficient irrespective of whether or not the Rule of the District Court has been observed.

That your affiant deducted from the investigation of the above Rules, statutes and decisions the conclusion that the judgment referred to in Rule 49 of this Honorable Court was to be construed the final judgment and which meant after the motion for new trial had been determined; that accordingly when the defendant's motion for new trial was denied on the 27th day of September, 1935, your affiant, within the ten days specified in Rule 49, and on the 3rd day of October, 1935, obtained an order from this Court extending the time within which the Bill of Exceptions herein may be served upon plaintiff or her counsel, and filed with the Clerk of this Court to and including January 15th, 1936, and in which the term of Court in which the judgment herein was rendered and entered was extended to and including said January 15th, 1936; that your affiant has at all times endeavored to meet and comply with all of the rules, statutes and decisions relating to the steps and procedure required to be taken and followed in preserving the record of the defendant for an appeal to the Circuit Court of Appeals upon not only the matters that appear in the record proper

but upon the matters which properly appear in the Bill of Exceptions. That if there has been any technical failure to comply with the rules of this Court in the matter of the time within which Bill of Exceptions must be settled your affiant submits it is because Rule 49 of this Honorable Court permits of several constructions and your affiant construed the same in the light of the only cases and decisions he could find bearing upon this question; that your affiant in his search has not found any case wherein it was held that the filing of a motion for new trial in judgment term did not extend the time for the filing and settling of a Bill of Exceptions though the ruling on the motion was not made until the following term.

WHEREFORE your affiant prays that if there has been any technical error on the part of affiant in taking the various steps required in this case to preserve the record of the defendant so that Bill of Exceptions may be approved and allowed and the matter determined by the Circuit Court of Appeals upon the merits and that it may consider the Bill of Exceptions, that he be relieved of such technical default by virtue and by reason of the aforestated facts and that the Bill of Exceptions as proposed herein, together with such amendments as may be approved, be settled and allowed.

This prayer for relief is based upon, to some extent, the case of MARION STEAM SHOVEL CO., V. REEVES, 76 Fed. (2nd) 462 (C. C. A. 8).

W. G. Danielson

[illegible]

W. G. Danielson, being first duly sworn, deposes and says: That he is the declarant in the above declaration; that he has read the foregoing and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief and as to those matters that he believes it to be true.

W. G. Danielson

Subscribed and sworn to before me this 16th day of  
December, 1935.

[Seal]

Mary Jorgensen

Notary Public in and for the above County and State.

[Endorsed]: Received copy of the within Statement  
this 16 day of Dec. 1935. H. G. Balter, attorney for Pl.  
Filed Dec. 16, 1935 R. S. Zimmerman Clerk By R. S.  
Simpson Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PETITION FOR APPEAL AND ORDER  
ALLOWING APPEAL

TO THE HONORABLE GEO. COSGRAVE, JUDGE  
OF THE DISTRICT COURT AFORESAID:

The above named defendant, feeling aggrieved by the verdict of the jury and judgment entered thereon in the above entitled action on the 10th day of May, 1935, hereby appeals from said verdict and judgment to the United States Circuit Court of Appeals for the Ninth Circuit; that the errors upon which such appeal is based are contained in the Assignment of Errors filed herewith; that petitioner prays that his appeal be allowed and that a Citation be issued in accordance with law; and that an authenticated transcript of the record, proceedings and exhibits on the trial be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California;

And your Petitioner further prays that an order be made fixing the amount of security to be given by Appellant conditioned as approved by law.

DATED: This 19th day of December, 1935.

BICKSLER, PARKE & CATLIN  
PAUL V. SHEEHAN,

BY W. G. Danielson

Attorneys for Appellant.

## ORDER

Appeal allowed upon Appellant furnishing Bond as required by law in the amount of \$250.00

DATED: On the 19th day of December, 1935.

BY THE COURT:

Geo. Cosgrave  
Judge

[Endorsed]: Filed Dec 19 1935 R. S. Zimmerman,  
Clerk By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED  
STATES IN AND FOR THE SOUTHERN  
DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

LENA G. SMUCKLER, doing )	(	
business as FRENCH VENEER (	)	
MANUFACTURING COM-	)	
PANY,	(	No. 5558-C
	Plaintiff, )	
	(	ASSIGNMENT
vs	)	OF ERRORS.
	(	
LIQUID VENEER CORPORA-	)	
TION, a corporation,	(	
	Defendant. )	

— — — — —

Comes now LIQUID VENEER CORPORATION, a corporation, defendant and Appellant in the above entitled cause, and in connection with and as a part of its Petition for Appeal assigns the following as errors which occurred on the trial here of and on proceedings had herein both before and after said trial, and upon which errors defendant relies to reverse the judgment entered herein as appears of record, and files the following Assignment of Errors.

1. Neither the Superior Court of the State of California, in and for the County of Los Angeles, nor the United States District Court for the Southern District of California, Central Division, nor other State or Federal Court in the State of California, has now nor has ever acquired or had jurisdiction in this action over defendant,



a foreign corporation (N. Y.), for the reason that the record shows the Summons herein was served on defendant by serving the Secretary of State of the State of California, on March 1, 1932, and the record fails to show that at or prior to said date no person had been designated as defendant's agent for service of process or authorized to receive service of process in its behalf and which showing is required by Section 406a of the Civil Code of the State of California, by the plaintiff, before process against a foreign corporation may be served upon the Secretary of said State.

2. Neither the Superior Court of the State of California, in and for the County of Los Angeles, nor the United States District Court for the Southern District of California, Central Division, nor other State or Federal Court in the State of California, has now nor never has acquired nor had jurisdiction in this action over defendant, a foreign corporation (N. Y.), for the reason that the record shows the Summons herein was served on defendant by serving the Secretary of State of the State of California, on March 1, 1932, and the record fails to show that at or prior to that date, or at any time, that the President or other head of the corporation, a Vice-President, a Secretary, an Assistant Secretary or General Manager thereof in said State could not be found in said State, after diligent search, and which showing is required by Section 406a of the Civil Code of the State of California, by the plaintiff before process against a foreign corporation may be served upon the Secretary of said State.

3. The District Court erred in denying defendant's Motion filed May 2, 1932, to vacate, set aside and quash the alleged and pretended service of summons upon de-

fendant, foreign corporation (N. Y.) by serving the Secretary of State of the State of California, made on the grounds that (a) defendant was not a citizen or resident of, nor doing business in the State of California, nor in said District, prior to or at the time of service of Summons upon it, or subsequently thereto; (b) said Secretary of State of the State of California, nor any deputy thereof, nor other person within the State of California, was authorized to represent defendant or to receive process for or on its behalf; and (c) defendant not subject to the jurisdiction of either the State or Federal Courts in California, and to which denial exception was taken and noted.

4. The District Court erred in denying defendant's renewed motion filed May 7, 1935, to vacate, set-aside and quash the alleged and pretended service of Summons upon defendant, foreign corporation (N. Y.) by serving the Secretary of State of the State of California, on the grounds that (a) defendant was not a citizen or resident of, nor doing business in the State of California, nor in said District, prior to or at the time of service of Summons upon it, or subsequently thereto; (b) said Secretary of State of California, nor any deputy thereof, nor other person within the State of California, was authorized to represent defendant or to receive process for or on its behalf; and (c) defendant not subject to the jurisdiction of either the State or Federal Courts in California, and to which denial exception was taken and noted.

5. The District Court erred in permitting the plaintiff to testify upon the re-opening of defendant's motion to quash service of Summons to a conversation she said she had over two years prior thereto with a bookkeeper at the warehouse in San Francisco in which defendant stored

some of its merchandise and to the effect that customers of defendant could come there and purchase Liquid Veneer and have it shipped to them, that she could purchase Liquid Veneer there and have it shipped to her address, that agents were there to take orders and would ship from the warehouse, and that Mr. Mack, a salesman for defendant, brought his orders there for shipment, all over the objection of defendant that said conversation was immaterial, incompetent and purely hearsay.

6. The District Court erred in reserving a ruling on and refusing to grant defendant's motion to strike out the testimony of the plaintiff upon the re-opening of defendant's motion to quash service of Summons to a conversation she said she had over two years before with a bookkeeper at the warehouse in San Francisco in which defendant stored some of its merchandise, to the effect that customers could come there, purchase Liquid Veneer and have it shipped to them, that she could purchase Liquid Veneer there and have it shipped to her address, that agents were there to take orders and would ship from the warehouse, and that Mr. Mack, a salesman for defendant, brought his orders there for shipment, on the ground that said testimony appeared to be purely and entirely hearsay and a recital of statements from one on which no foundation is laid.

7. The District Court erred in refusing to entertain or hear defendant's motion made at the time of trial out of the presence of the jury and before any evidence was presented to dismiss plaintiff's complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and which refusal to entertain or hear was on the ground that the motion was untimely made.

8. The District Court erred in denying defendant's motion made after the opening statement to the jury by plaintiff's counsel to dismiss the complaint on plaintiff's opening on the grounds that it did not allege jurisdictional facts, did not allege that the letter pleaded therein was "of and concerning the plaintiff", did not allege that the pleaded letter was an unprivileged communication, to which denial exception was duly taken and noted.

9. The District Court erred in overruling defendant's objection made when the first witness for the plaintiff was called and sworn and stated her name, but before she gave any testimony, to the introduction of any evidence by the plaintiff upon the grounds that the complaint did not constitute a cause of action; the pleaded letter is a privileged communication; there was no allegation of a publication of the alleged libel; there was no allegation the pleaded letter was "of or concerning plaintiff", her name not appearing in said letter; that no element of damages was alleged, to which order exception was duly taken and noted.

10. The District Court erred in overruling defendant's objection to the amendment suggested by the Court and proposed by the plaintiff after the first witness for the plaintiff was called, that a clause reading "and has at all times hereinafter mentioned been doing business in the State of California" be added to Paragraph II of the complaint, on the ground that said amendment created a cause of action that had not thereto existed as the complaint lacked sufficient jurisdictional allegations and the proposed amendment injected entirely new matter into it to which order exception was duly taken and noted.

11. The District Court erred in overruling defendant's objection to admission in evidence of a copy of letter dated June 2, 1931, from defendant to Young's Market (plaintiff's EX. 1) and set out in the complaint and stating in substance that defendant's inspector reports Young's Market to be selling a product called "French Veneer" and this letter is to inform it that defendant's attorney have advised that French Veneer was a violation of its trade-mark "Liquid Veneer" as well as its common law rights, that a Patent Attorney would inform Young's Market that the sale of an infringing product by a dealer is looked upon as contributory infringing and makes it equally liable with the manufacturer, that defendant has had more or less difficulty with the manufacturers of this French Veneer, has tried to purchase evidence against them but they have moved around from place to place, denying their identity and their financial condition has been found to be such as not to warrant litigation, that a manufacturer inducing a dealer to sell an infringing product sells the latter a law suit, that defendant is not in the business of suing people but must protect its property and requests the discontinuance of the sale of this infringing product, that if the manufacturer was desirous of building a business rightfully his own he could choose a name without taking part of a name belonging to defendant, who has spent a fortune in building up a business under it, that in adopting the name French Veneer the manufacturer is obviously trying to trade on the defendant's rights, and which objection was made upon the ground that it was incompetent, irrelevant and immaterial, that the original letter should be introduced and not a purported copy thereof, and to which ruling an exception was duly taken and noted.

12. The District Court erred in denying defendant's motion to strike from the evidence the letter dated June 2, 1931, addressed to Young's Market and set out in the complaint (plaintiff's EX. 1) and stating in substance that defendants, inspector reports Young's Market to be selling a product called "French Veneer" and this letter is to inform it that defendant's attorneys have advised that French Veneer was a violation of its trade-mark "Liquid Veneer" as well as its common law rights, that a Patent Attorney would inform Young's Market that the sale of an infringing product by a dealer is looked upon as contributory infringing *product by a dealer is looked upon as contributory infringing* and makes it equally liable with the manufacturer, that defendant has had more or less difficulty with the manufacturers of this French Veneer, has tried to purchase evidence against them but they have moved around from place to place, denying their identity, and their financial condition has been found to be such as not to warrant litigation, that a manufacturer inducing a dealer to sell an infringing product sells the latter a law suit, that defendant is not in the business of suing people but must protect its property and requests the discontinuance of the sale of this infringing product, that if the manufacturer was desirous of building a business rightfully his own he could choose a name without taking part of a name belonging to defendant who has spent a fortune in building up a business under it, that in adopting the name French Veneer the manufacturer is obviously trying to trade on the defendant's rights, and which motion was made on the grounds that said letter was not a libel, that it was a privileged communication, that it did not mention or refer to the plaintiff and the complaint did not allege



that the letter was of or concerning the plaintiff, and to which order exception was duly taken and noted.

13. The District Court erred in overruling defendant's objection to admission in evidence of a letter dated March 27, 1929, from defendant to May Department Stores Co., (plaintiff's EX. 2) and stating in substance that defendant had legal evidence that said company was handling French Veneer, that its attorney advises that French Veneer is a violation of its registered trade-mark "Liquid Veneer" as well as its common law rights and in handling the article the company was liable for damages with the manufacturer thereof, that its records show it has been difficult to meet the people in charge and because the sale was very meager the matter was allowed to rest for the time being, that now that the product has been found in the store of the company defendant is obliged to request the immediate stopping of the sale as were it not to do so it would jeopardise exclusive rights to its own trade-mark "Liquid Veneer", that defendant is not seeking trouble but must insist that its trade-mark and trade rights be respected which it intends to do in as friendly and business-like way as possible, which objection was made upon the ground the letter was irrelevant, incompetent and immaterial, inadmissible under the pleadings, having no relation whatsoever to the cause of action, was not properly authenticated and was in no way relevant to the allegations of the complaint and to which ruling an exception was duly taken and noted.

14. The District Court erred in overruling defendant's objection to admission in evidence of a letter dated April 2, 1929, from the May Company to defendant (plaintiff's EX. 3) stating in substance that the company had received a letter from defendant calling attention to the fact that



French Veneer was infringing on defendant's rights and the company would from that day on discontinue the sale of French Veneer, which objection was made on the grounds the letter was irrelevant, incompetent and immaterial, inadmissible under the pleadings, not binding upon the defendant, having no relation to this cause of action and that anything the writer thereof could have said therein would be hearsay, and to which ruling an exception was duly taken and noted.

15. The District Court erred in denying defendant's motion to strike from the evidence said letter dated April 2, 1929, from the May Company to defendant (plaintiff's EX. 3), stating in substance that the company had received a letter from defendant calling attention to the fact that French Veneer was infringing on defendant's rights and the company would from that day on discontinue the sale of French Veneer, which motion was made on the grounds that the letter was not the original and that it was hearsay, to which ruling exception was duly taken and noted.

16. The District Court erred in overruling defendant's objection to admission in evidence of a letter dated April 18, 1929, from defendant to the May Company (plaintiff's EX. 4), and stating in substance that the letter of the May Company dated the 10th was received and that the reversal of the company of its decision to take the infringing French Veneer off sale was no doubt due to misinformation but if the defendant was not in error in this regard it would have no course but to prove its case in Court as otherwise it would jeopardise its valuable rights in its trade-mark "Liquid Veneer", that no such action heretofore has been filed against manufacturers of French

Veneer as they could not be found and had no financial responsibility, but if the May Company decides to continue to market the product it would be joined in an action with the manufacturers thereof for it is a financially responsible company and could meet damages and costs which would be awarded the defendant for one aiding or abetting the sale of an infringing product is equally liable with the manufacturer thereof, that matters of this kind become expensive and it is suggested that the May Company look into the matter a little closer, not take defendant's word for it but submit the question to a real Patent Attorney, that the May Company is a valued customer and defendant desires to give it every opportunity to know all of the facts before coming to a decision which was being awaited as defendant could not afford to stand by and see its trade-mark and trade-rights disregarded, which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings as it had been written three years prior to June 2, 1931, the date of the letter set forth in the complaint and the basis of this cause of action, was to a different concern from the letter set forth in the complaint and which is the basis of the cause of action, and has no bearing on any of the issues involved in this action, and to which ruling an exception was duly taken and noted.

17. The District Court erred in overruling defendant's objection to admission in evidence of a letter dated April 30, 1929, from defendant to the May Company (plaintiff's EX. 5), and stating in substance that defendant had received a report from its representative that the May Company was continuing to sell French Veneer, thereby aiding and abetting an infringing manufacturer to palm off French Veneer for genuine Liquid Veneer, thereby in-

jurying the defendant and being unfair to the public and requesting the withdrawal of the product from the market, which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings as it had been written three years prior to June 2, 1931, the date of the letter set forth in the complaint and which is the basis of this cause of action, was to a different concern than the letter alleged, has no bearing on any of the issues involved in this cause of action, and is not authenticated, and to which ruling an exception was duly taken and noted.

18. The District Court erred in overruling defendant's objection to admission in evidence of a letter dated April 13, 1931, from the defendant to the May Company (plaintiff's EX. 6) and stating in substance that the defendant wanted to know if the May Company now intended to renew its sale of French Veneer when that question had been settled about a year ago, that the sale had not been stopped through the manufacturer because he jumped from pillar to post and defendant was unable to put its finger upon him and his identity had been denied, that in view of the circumstances it was natural for it to protect its trade-mark rights by joining in an action a responsible house who sells the infringing article and since the May Company is a responsible house and sells the product the natural thing to do is to sue it, that law suits are expensive but if the May Company thinks the matter is worth its time defendant will have no alternative but to go ahead, that any suit commenced would be in the friendliest manner it could possibly have it because the May Company is considered a valued customer and friend, that the trade-mark "Liquid Veneer" is well established and has been adjudicated in the Courts and to permit French Veneer

to infringe uninterrupted would be like acquiescing to its validity and others would begin jumping in the field and the first thing that would be known there would be all kinds of Veneers on the market, that if the May Company desires to handle French Veneer because it is a good product or for any other reason it should have the manufacturer adopt another name, that there are many good names which could be used for the polish, that the use of the word "Veneer" was for the purpose of trading on defendant's good will and name and defendant is duty bound to protect it, which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible, had been written prior to June 2, 1931, is to a different concern than the letter alleged, has no bearing on any of the issues involved in this cause of action, and is not authenticated, and to which ruling an exception was duly taken and noted.

19. The District Court erred in overruling defendant's objection to admission in evidence of a letter dated April 23, 1931, from defendant to the May Company (plaintiff's EX. 7), and stating in substance that defendant congratulated the May Company on its business judgment in deciding in the manner it had, that the May Company was misinformed when told that defendant's representative could lay his hands on the manufacturer of French Veneer as defendant had tried to buy evidence against the manufacturer but had failed to secure the evidence as they refused to sell their products to the defendant's representatives and denied their identity, that if the May Company cared to bother at all any further it might explain to the manufacturers of French Veneer that when defendant commences an action against them some reputable customer or distributor of their product will be joined in the suit

so that whatever the manufacturers are unable to pay due to financial circumstances their distributor will make up for it, which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings as it had been written prior to June 2, 1931, was to a different concern than the letter alleged in the complaint, has no bearing on any of the issues involved in this cause of action, and is not authenticated, and to which ruling an exception was duly taken and noted.

20. The District Court erred in overruling defendant's objection to admission in evidence of a letter dated May 1, 1931, by defendant to May Company (plaintiff's EX. 8), and stating in substance that possibly the May Company is not aware that French Veneer is still on sale in one of its departments and after the demonstration thereof had been taken off, that defendant is not desirous of injuring anyone and if the manufacturer of the product wanted to go on doing business they should adopt a trade-name of their own which would be legal and build their business on the quality of their product and on their own trade-mark or name as the defendant has done, that evidence is in hand to prove that French Veneer is confusing to the public, that defendant does not want to start litigation against the manufacturers for they are not financially responsible and defendant then would have to join a responsible concern, meaning expense and trouble for the customer, that it is for that reason the May Company would have to be joined in some such action, that a final settlement of the question would be appreciated, which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings as it had been written prior to June

2, 1931, was to a different concern than the letter alleged, has no bearing on any of the issues involved in this cause of action, and is not authenticated, and to which ruling an exception was duly taken and noted.

21. The District Court erred in overruling defendant's objection to admission of evidence of Mr. Strauss, Vice-President of the May Company, that French Veneer was taken off sale by it in 1928 and kept off sale during 1929 and portion of 1930, which objection was on the ground that such acts occurred prior to the date of the letter in the complaint, dated June 2, 1931, and to which ruling an exception was duly taken and noted.

22. The District Court erred in overruling defendant's Motion to Strike the letters sent to the May Company by the defendant and admitted into evidence as plaintiff's Exhibits Nos. 2, 4, 5, 6, 7, and 8, and the evidence of Mr. Strauss, Vice-President of the May Company, that French Veneer was taken off sale by it in 1928 and kept off sale during 1929 and a portion of 1930, which motion was on the ground that said evidence related to events which all occurred prior to the date of the letter in the complaint, namely, June 2, 1931, and to which ruling an exception was duly taken and noted.

23. The District Court erred in stating before the jury in colloquy with respective counsel respecting the admissibility of the letters addressed to the May Company, dated May 27, 1929, April 18, 1929, April 30, 1929, April 13, 1931, April 23, 1931 and May 1, 1931, respectively and all prior to the date of the letter alleged in the complaint, to-wit; June 2, 1931, that in the absence of a specific objection heretofore made by defendant as to what was included or for an analysis of the complaint, the



Court was compelled to say that the basis of damage may reasonably be held to include all of the previous letters, to which statement an exception was duly taken and noted.

24. The District Court erred in admitting into evidence letters from the defendant addressed to the May Company, and being plaintiff's Exhibits Nos. 2, 4, 5, 6, 7, and 8 and all being dated prior to June 2, 1931, the date of the letter alleged in the complaint, on the theory that the basis of damage could include all of said previous letters, over defendant's objection and exception that the complaint alleged damages arising from only one letter, to-wit; one dated June 2, 1931, and addressed to Young's Market Co., and that said letters to the May Company prior to said date therefore were incompetent, irrelevant, immaterial and inadmissible under the pleadings.

25. The District Court erred in admitting the evidence of Mr. Strauss, Vice-President of the May Company, that no complaints were made to him that the public was confused as to buying the product of defendant or the plaintiff, over the defendant's objection that the same was irrelevant, incompetent and immaterial, and to which ruling an exception was duly taken and noted.

26. The District Court erred in admitting the evidence of Mr. Strauss, Vice-President of the May Company, that he never had any complaints from customers or buyers or managers of departments, that there was no confusion in the minds of the public between the plaintiff's and defendant's products, over defendant's objection that said evidence was irrelevant, incompetent and immaterial, the question asked the witness was leading and called for his conclusion, that said evidence had no bearing on the libel charged in the complaint, and to which ruling an exception was duly taken and noted.



27. The District Court erred in admitting the evidence of Mr. Strauss, Vice-President of the May Company, that in 1930 he suggested to the plaintiff that she should change the name of her product and restore it as French Polish because the demand for her polish was great and she had a customer following, over defendant's objection that said evidence was irrelevant, incompetent, immaterial and not binding on the defendant, and to which ruling an exception was duly taken and noted.

28. The District Court erred in admitting the evidence of Mr. Strauss, Vice-President of the May Company, that he contemplated placing plaintiff's products in other stores of the May Company, over defendant's objection that this evidence was speculative and not binding on the defendant, was incompetent, irrelevant and immaterial, and to which ruling an exception was duly taken and noted.

29. The District Court erred in admitting the evidence of Mr. Strauss, Vice-President of the May Company, that plaintiff's product was not placed in other stores of the May Company because it was "not wanting to buy litigation", over defendant's objection that this evidence was irrelevant, incompetent, immaterial, called for the conclusion of the witness and was not binding upon the defendant, to which ruling an exception was duly taken and noted.

30. The District Court erred in admitting the evidence of Mr. Strauss, Vice-President of the May Company, that the decision of the May Company not to place French Veneer in all the other stores of the May Company had no relationship to the quality or value of that product for sales purposes, over the defendant's objection that this evidence was irrelevant, incompetent and immaterial, inadmissible under the pleadings and not binding on the

defendant, to which ruling an exception was duly taken and noted.

31. The District Court erred in permitting Mr. Strauss, Vice-President of the May Company, to answer a hypothetical question that assuming from his experience as a merchandiser for thirty years and his intimate knowledge of the plaintiff's product and its competitive quality compared with other products of the same type and his personal knowledge of the plaintiff in a business relationship from his experience with her, and assuming that there were no harassment of her conduct, no threatening letters were sent to her customers by the defendant, would he say that the plaintiff could have extended her business substantially beyond the bounds that he knew it, over the defendant's objection that it was irrelevant, incompetent, immaterial and not proper, that the witness was not properly qualified, that there was no evidence on which to base any such hypothetical question, that it called for the witness' conclusion and was speculative, and which objection was overruled and to which ruling an exception was duly taken and noted.

32. The District Court erred in overruling defendant's objection to the admission in evidence of a copy of letter dated April 10, 1929, from the May Company to defendant (plaintiff's EX. 13), stating in substance that the plaintiff and her son had called on the May Company, that it did not consider French Veneer an infringement on Liquid Veneer, that the owners of French Veneer had been in the 'phone book for a number of years and their addresses could be obtained through the May Company, that plaintiff's son was an attorney located in a building in Los Angeles, and that the May Company was going to change its mind and sell French Veneer until such

time as defendant could show that it had an order restraining the plaintiff from selling her product and which objection was made on the grounds that the letter was irrelevant, incompetent, immaterial, hearsay, not the best evidence, and inadmissible under the pleadings, to which ruling an exception was duly taken and noted.

33. The District Court erred in admitting the evidence of Mr. Max, of the May Company, that plaintiff's product was taken off sale at the May Company upon receipt of letter from defendant, dated March 27, 1929, (plaintiff's EX. 2) and kept off until 1930, when French Polish was substituted for French Veneer, over defendant's objection that any transactions between plaintiff and the May Company were absolutely incompetent, irrelevant, immaterial because the letter forming the basis of this action is addressed to Young's Market Co., and is dated June 2, 1931, and that transactions with the May Company, or any other Company, prior to June 2, 1931, would have no bearing upon the allegations of the complaint and were therefore irrelevant, incompetent and immaterial, to which ruling an exception was duly taken and noted.

34. The District Court erred in admitting the evidence of Mr. Max, of the May Company, that he never received any complaint from anyone that there was any palming off of plaintiff's product for defendant's product, over defendant's objection that any transaction between the plaintiff and the May Company was incompetent, irrelevant and immaterial since this action was based on a letter to Young's Market Co., dated June 2, 1931, to which ruling an exception was duly taken and noted.

35. The District Court erred in stating and impartially arguing before the jury in *colloquy* with counsel for de-

fendant upon objection of said counsel to a question asked Mr. Waddington, a witness for plaintiff, on direct examination and an employee of Young's Market Co., if the original letter of plaintiff's EX. 1 was received by him, and which objection was made on the ground that the complaint did not allege that the letter was received by Young's Market Co., the Court stating, questioning and arguing that did counsel not know that the answer admitted writing the letter but denied it was written for the purpose of injuring the plaintiff; that counsel's statement, he did not believe himself in a position to deny that the letter was written was exactly what the Court wanted, that counsel's position will thenceforth be the observance of the rule prevailing in that Court and in all business or trials that when there is an open and evident fact it will not be denied, that this Court and trial from the beginning has been delayed by technical—and the Court would not otherwise describe it—questioning as to whether said letter was written, that if the letter was written *lets* have it admitted, the Court did not want to hear any more of it during the trial, that the Court certainly took the statement made the day before by counsel that he did not have a copy of the letter as a denial that the letter had been written and that counsel's whole conduct was a denial that the letter had been written, and to which statements and remarks exception was duly taken and noted.

36. The District Court erred in overruling defendant's objection to the admission of a letter in evidence from it to Young's Market Co., dated September 16, 1931, (plaintiff's EX. 14) stating in substance that defendant could no longer wait for a reply to its legal notice and friendly explanation of its position concerning the sale of the infringing product, French Veneer, that if its sale is

immediately stopped the defendant would release Young's Market Co. from all claims for past infringements and in doing this the defendant was extending a favor for litigation becomes very expensive, that silence to the offer of defendant would leave it no alternative but to place the entire matter in the hands of its attorneys, and which objection was on the ground that said letter was irrelevant, incompetent, immaterial, hearsay, not the best evidence and inadmissible under the pleadings, to which ruling an exception was duly taken and noted.

37. The District Court erred in overruling defendant's objection to the admission in evidence of a letter from defendant to Young's Market Co., dated October 1, 1931, (plaintiff's EX. 15) stating in substance that defendant would have established its rights in Court against the Smucklers had they not denied their identity, moved from place to place and made it difficult for defendant to pin them down and obtain evidence against their unlawful practice, that besides they were not financially responsible and when an action is to be started against them some reputable company selling their products and thereby aiding the infringer will be joined to pay the costs and damages, and such action will be commenced against Young's Market Co. if it insists on aiding and abetting this infringer, that defendant would spend thousands of dollars on its trade rights but not five cents in tribute, and which objection was made on the ground that said letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings, to which ruling an exception was duly taken and noted.

38. The District Court erred in overruling defendant's objection to the admission in evidence of a letter from defendant to Young's Market Co., dated October 16, 1931,

(plaintiff's EX. 16) stating in substance that in reply to the belief of the Young's Market Co., that the Smucklers were not infringers that Young's Market Co., on consulting with a reputable Patent Attorney would find that French Veneer is an infringement of the trade-mark and name "Liquid Veneer" and besides constituted unfair competition, that the Smucklers are guilty on two counts and liable for all they have sold in the past and Young's Market Co. is equally guilty with them as a distributor and if it desires to continue the sale of French Veneer it will be necessary to commence an action against it in the United States District Courts, that in the United States District Court in Cincinnati, Ohio, it was held that "20th Century Veneer Gloss" was an infringement of its name and which should be considered as a substantial precedent, that the defendant will be glad to forward to the attorney for Young's Market Co. a copy of the decree of the Court in the matter of the case of the 20th Century Veneer Gloss, that the defendant is trying to save the Young's Market Co. from difficulty or expenditures but if it must go into Court to settle the matter it is going to demand damages for every bottle sold by the company and every bottle manufactured by Smucklers, which objection was made on the ground that said letter was irrelevant, incompetent, immaterial and inadmissible under the pleadings, to which ruling an exception was duly taken and noted.

39. The District Court erred in permitting Mr. Waddington, an employee of Young's Market Co., to answer the hypothetical question "As a merchandising man with experience of over forty years, I think you said, Mr. Waddington, and with your knowledge of this product and with your knowledge of how it sold at Young's



Market in comparison with so-called well-established products, would you say that, — — — if it were allowed to develop normally, would you say that the plaintiff's product could be expanded into a large profitable business?"', over defendant's objection that it called for the conclusion of the witness, for a speculative answer, and that there was no basis for such a hypothetical question, to which ruling an exception was duly taken and noted.

40. The District Court erred in denying defendant's Motion to Strike the evidence of Mr. Waddington, employee of Young's Market Co. in answer to the hypothetical question that with his knowledge of the plaintiff's product and how it sold in comparison with so-called well-established products and assuming it were allowed to develop normally would he say that plaintiff's product could be expanded into a large profitable business and in answer to which he stated that during his experience in marketing polishes of this sort he had never at any time found anything that came onto the market as quickly as this French Veneer and that at the time the threatening letter was received French Veneer was far outselling any other polish in the house and it was just like cutting it off with a knife, that it stopped all at once as a result of said letter, and which motion to strike was made on the ground that the witness was dissertating upon the qualities of French Veneer and characterizing the effect upon his business of said letter, that said dissertation of quality was outside the issue of this law suit, to which ruling an exception was duly taken and noted.

41. The District Court erred in admitting the evidence of Winifred M. Jacobs to the effect that when she recently asked for French Veneer at the May Company she was



offered French Polish which she at first refused to buy until the plaintiff told her it was the same as French Veneer, over defendant's objection that such evidence was irrelevant, incompetent, immaterial and in no way binding upon the defendant nor within the issues of the pleadings as to what said witness could do, that it was not within the elements of a libel, was purely speculative on the part of the witness and was entirely without the issues of the case, to which ruling an exception was duly taken and noted.

42. The District Court erred in admitting the evidence of plaintiff that after the first letter to the May Company from defendant in 1929 her business fell off to almost nothing, over defendant's objection that such evidence was irrelevant, incompetent, and immaterial under the pleadings, to which ruling an exception was duly taken and noted.

43. The District Court erred in denying defendant's motion for a non-suit and for dismissal of the action after all of the evidence was in and the case closed and made upon the grounds that the plaintiff had failed to establish any cause of action against the defendant, that the complaint fails to allege a cause of action, that the letter of June 2, 1931, addressed to Young's Market Co., and the basis of the complaint, is a privileged communication from a party interested in the subject of the communication to a distributor who is likewise interested, that the plaintiff is not named in the communication, there is no allegation in the complaint which alleges that the letter was written of or concerning the plaintiff, to which ruling an exception was duly taken and noted.

44. The District Court erred in permitting the plaintiff, after the close of her case and in the midst of de-

fendant's argument on a motion for non-suit on the grounds, among others, that the complaint did not allege nor did the facts prove a cause of action, to amend her complaint to the effect that the letter alleged in Paragraph VI "was intended to refer to the plaintiff, Lena G. Smuckler", over defendant's objection to the allowance of the amendment at the stage in the case when the plaintiff's case was closed, to which ruling an exception was duly taken and noted.

45. The District Court erred and confused the jury in instructing it that "under the law an unprivileged communication as applied to this case is a communication made without malice", over defendant's objection and exception that the Court had apparently misspoken in defining a privileged communication.

46. The District Court erred in failing and refusing to correct what was apparently a misstatement when it instructed the jury that "under the law an unprivileged communication as applied to this case is a communication made without malice", over defendant's objection and exception and after the attention of the Court to the same had been called.

47. The District Court erred in instructing the jury that "if malice exists then privilege cannot be claimed. 'To a person interested therein,' that is, interested in the communication. It might reasonably be said that the Young Company or the May Company -- the Young Company this letter was addressed to, I believe -- was interested in the subject. 'By one who is also interested.' That would be the Liquid Veneer Corporation. 'Or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive

for the communication to be innocent or was requested by the person interested to give the information.' In other words, if this were a legitimate trade necessity, a legitimate communication from one business house to another and written in good faith and everything true in it, it would be a privileged communication and recovery could not be had for it. However, if it is not made in good faith, though it be true, it is not privileged. If it is false, though it otherwise agrees with the definition of 'privilege', it is not privileged.", and to which defendant took exception on the ground that if the communication from which the Court read is privileged, then though the matters therein stated were false or uttered under a mistaken belief it still remained privileged.

48. The District Court erred in instructing the jury, after reading portions of the letter dated June 2, 1931, set forth in the complaint that, "Now, gentlemen, consider seriously whether those statements are true. You are at liberty to and should contrast that with the statement of the witnesses here that the telephone of this woman was in the telephone directory throughout the time. I think the representative of the Young store said he had never any difficulty -- in fact, both witnesses stated they had never had any difficulty in finding her. And you will thereupon conclude whether that is a true statement.", and to which defendant took exception on the grounds that if the communication is privileged, even though the matters stated were false or uttered under a mistaken belief, it still remains privileged.

49. The District Court erred in instructing the jury, after reading a portion of the letter dated June 2, 1931, and set forth in the complaint, "Speaking again of the manufacturer of French Veneer, the letter goes on to

say: 'His object for adopting the name French Veneer is obvious. He is trying to trade on our rights.' That, I think, as counsel stated, if a fact, is a criminal offense and infringement under the Federal statutes. Infringement of an interstate trade-mark may be punished criminally. Now, having all of those things in mind, you will make up your minds whether this exposes the plaintiff to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his business. As a matter of fact, a substance which is of general knowledge, like wood, iron, paint, that in and of itself is not the subject of the exclusive appropriation of anybody as a trade right. You sell a certain kind of flour or a certain kind of oatmeal or what not, naturally, of course, nobody can claim an exclusive right in a generic name of a well-known material exclusively. The combination only may be appropriated. The right in a trade-mark is based upon the tendency to deceive the public; that one will sell his own goods to the public intending and under conditions where the public believe them to be the goods of someone else.", to which defendant took exception on the ground that the Court was submitting to the jury the question of infringement whereas the defendant had a trade-mark and what it believed was its rights under that trade-mark was the only thing pertinent in this action.

50. The District Court erred in refusing to instruct the jury to return a verdict in favor of the defendant as requested by it upon the close of the case, and to which refusal exception was duly taken and noted.

51. The District Court erred in refusing to instruct the jury as requested by defendant that, "as a matter of law, communications relied on by plaintiff in this action

are privileged communications and that, therefore, plaintiff cannot recover unless she proves by a preponderance of the evidence that said publication or publications, even though false, were sent out by the defendant with malicious intent. Malice is a desire and disposition to injure another founded upon spite or ill will. Therefore, if you should find that the alleged publications even though false were not founded upon enmity to the plaintiff but were made with the sole desire on defendant's part to protect its own interests, then your verdict must be for the defendant.", and to which refusal exception was duly taken and noted.

52. The District Court erred in refusing to instruct the jury as requested by defendant that, "If you find the statements in the alleged libelous publications to be true, then your verdict must be in favor of the defendant. In this connection the letters relied upon by plaintiff state that plaintiff was infringing its registered trade-mark. You are instructed that, if defendant honestly believed that plaintiff was an infringer, said statements were and are not libelous.", and to which refusal an exception was duly taken and noted.

53. The verdict of the jury awarding plaintiff \$11,-000.00 as actual or compensatory damages is not supported by any substantial evidence but is so large that it indicates gross error and disregard of the evidence and the jury was actuated by improper motive or by passion or prejudice in arriving at its verdict.

54. The verdict of the jury awarding plaintiff \$9,-000.00 as punitive or exemplary damages is wholly erroneous as the complaint contains no allegations relating to exemplary damages.

55. The verdict of the jury awarding \$9,000.00 to plaintiff as exemplary damages is not supported by any evidence but indicates gross error and disregard of the evidence by the jury and that it was actuated by improper motive or by passion or prejudice against defendant in arriving at its verdict.

56. That the evidence is insufficient to sustain the verdict of the jury and the judgment thereon.

57. The District Court erred and abused its discretion in denying defendant's motion for new trial which was made and particularly urged on the ground that the Court at no time has had jurisdiction over defendant, a foreign corporation (N. Y.) because the records in this case affirmatively show that it was served on March 1, 1932, by serving Summons and copy of complaint upon the Secretary of State of the State of California, and that said records further affirmatively show that on said date, prior thereto, at the times the motion to quash was filed and heard and at the present time there has been no compliance by the plaintiff with the requirements of Section 406a of the Civil Code of the State of California, that plaintiff could not find, after diligent search, neither the President nor other head of the corporation, a Vice-President, a Secretary, an Assistant Secretary, or General Manager, if any, in this State, before process was or could be served upon the Secretary of State of the State of California, and the records in this case further affirmatively show that on said March 1, 1932, and at the time of the filing of the Motion to Quash and its submission to the Court for decision, the plaintiff failed to comply with the requirements of Section 406a of the Civil Code of the State of California by showing that no person had



been designated as the agent for defendant for the service of process or had been authorized to receive service of process on its behalf, or if such agent had been designated he could not be found with due diligence before process was or could be served upon the Secretary of State of the State of California, and which Motion was made upon all of the files and records in this proceeding.

58. The District Court erred in denying, on September 9, 1935, after the defendant's Motion to Dismiss complaint had been withdrawn and the Court had ordered its withdrawal, defendant's Motion to Strike from the files, the affidavits filed by plaintiff in defense of defendant's Motion to Dismiss, of John Brash, Byron Jack Badham, Jr., and Isador I. Smuckler, filed on the 26th day of July, 1935, and of J. W. Howell, filed on August 14, 1935, and made on the grounds that the said affidavits were incompetent, irrelevant and immaterial and there was nothing before the Court at said hearing to which said affidavits did or could refer or pertain, and to which ruling an exception was duly taken and noted.

WHEREFORE, the Liquid Veneer Corporation, a corporation, defendant and appellant, prays that the judgment in said cause be reversed and the cause remanded with instructions to the trial Court as to the further proceedings herein, and for such other and further relief as may be just in the premises.

BICKSLER, PARKE & CATLIN  
PAUL V. SHEEHAN

BY W. G. Danielson

Attorneys for Appellant.

[Endorsed]: Filed Dec 19 1935 R. S. Zimmerman,  
Clerk By Edmund L. Smith, Deputy Clerk.



[TITLE OF COURT AND CAUSE.]

### UNDERTAKING FOR COSTS ON APPEAL

WHEREAS, the Defendant in the above-entitled action is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment entered against Liquid Veneer Corporation, a corporation, Defendant in said action, in said District Court of the United States for the Southern District of California, Central Division, in favor of the Plaintiff in said action, on the 10th day of May, 1935, for Twenty Thousand (\$20,000.00) Dollars, and costs of suit.

NOW THEREFORE, in consideration of the premises, and of such appeal, the undersigned, THE AETNA CASUALTY AND SURETY COMPANY, a corporation duly organized and doing business under and by virtue of the laws of the State of Connecticut, and duly licensed for the purpose of making, guaranteeing or becoming a surety upon bonds or undertakings required or authorized by the law of the State of California, does hereby undertake and promise, on the part of the Appellant, that the said Appellant will prosecute said appeal to effect and will pay all costs which may be awarded against Liquid Veneer Corporation, a corporation, on the appeal, or on a dismissal thereof or if it fail to make good its plea, not exceeding Two Hundred Fifty (\$250.00) Dollars, to which amount it acknowledges itself justly bound.

[Seal]

THE AETNA CASUALTY AND  
SURETY COMPANY

BY Joseph I. Johnson

Resident Vice President

ATTEST M A Page

Resident Assistant Secretary

DATED this 19th day of December, A. D. 1935.

STATE OF CALIFORNIA,       )  
   ( SS.  
 COUNTY OF LOS ANGELES    )

On this 19th day of December, in the year nineteen hundred 35, before me, MARY E. ROGERS, a Notary Public in and for the said County of LOS ANGELES, STATE OF CALIFORNIA, residing therein, duly commissioned and sworn, personally appeared JOSEPH I. JOHNSON, known to me to be the Resident Vice-President and M. A. PAGE, known to me to be the Resident Assistant Secretary of THE AETNA CASUALTY AND SURETY COMPANY, the corporation which executed the within and annexed instrument and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

Mary E Rogers

Notary Public in and for said Los Angeles County, State  
 of California

*Notary Public in and for the County of Los Angeles,  
 State of California.*

My Commission Expires March 11, 1938

Examined and recommended for approval as provided  
 in rule 28

W. G. Danielson of  
 Bicksler Parke & Catlin &  
 Paul P. Sheehan

Attorney

I hereby approve the foregoing bond.

Dated the 19th day of Dec. 1935

Geo. Cosgrave  
 Judge

[Endorsed]: Filed Dec 19 1935 R. S. Zimmerman,  
 Clerk By Edmund L. Smith Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION AND ORDER.

IT IS HEREBY STIPULATED by and between plaintiff and defendant, through their respective counsel, that the above entitled Court may make an order directing the Clerk of this Court to forward to the Clerk of the Circuit Court of Appeals for the Ninth Circuit for use in and as a part of the record and proceedings on the appeal taken in this proceeding, and for the reason that it is not possible to accurately reproduce in the Bill of Exceptions said exhibits, the following set forth and described exhibits introduced at the trial of this action, to-wit:

Plaintiff's Exhibit 9. Bottle of Liquid Veneer polish.

Plaintiff's Exhibit 10. Carton in which Liquid Veneer polish sold.

Plaintiff's Exhibit 11. Bottle of French Veneer polish.

Plaintiff's Exhibit 12. Carton in which French Veneer polish sold.

Plaintiff's Exhibits 17, 18 and 19. Plaintiff's Certificates of Award.

Dated: December 18th, 1935.

ELIJA M. SMUCKLER and  
HARRY G. BALTER

By Harry Graham Balter  
Attorneys for Plaintiff.

BICKSLER, PARKE & CATLIN and  
PAUL V. SHEEHAN

By W. G. Danielson  
Attorneys for Defendant.

## ORDER

It is so Ordered.

Dated: Dec. 19, 1935

Geo. Cosgrave

Judge of the U. S. District Court.

[Endorsed]: Filed Dec 19 1935 R. S. Zimmerman,  
Clerk By Edmund L. Smith, Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

STIPULATION RE: OMISSION IN PRINTED  
TRANSCRIPT OF CAPTIONS.

IT IS HEREBY STIPULATED, by and between  
counsel for the respective parties hereto that in the prep-  
aration of the printed transcript of the record on appeal in  
this proceeding the captions at the top of all pleadings in-  
dicating the name of the Court, name of the cause and  
parties and Docket Number may be omitted.

DATED: December 23, 1935.

Harry Graham Balter

Harry Graham Balter,

attorneys for plaintiff.

BICKSLER, PARKE & CATLIN

PAUL V. SHEEHAN

BY W. G. Danielson

Attorneys for defendant.

[Endorsed]: Filed Dec 27 1935 R. S. Zimmerman,  
Clerk By Robert P. Simpson Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

PRAECIPE

TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

YOU ARE HEREBY REQUESTED to make and certify a transcript of the record in the above proceeding and cause it to be filed in the Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in said proceeding, and to include in such transcript the following:

1. Complaint No. 332470 filed in the Superior Court of the State of California, in and for the County of Los Angeles, on the 17th day of December, 1931, and entitled LENA G. SMUCKLER, doing business as FRENCH VENEER MANUFACTURING COMPANY, Plaintiff, vs LIQUID VENEER CORPORATION, a corporation, Defendant.

2. Bond on Libel filed by Plaintiff in said Superior Court action No. 332470 on the 17th day of December, 1931, in the sum of \$500.00 and executed by S. S. Wolfson and M. Lowis.

3. Summons issued by the Clerk of the Superior Court of the State of California, on the 17th day of December, 1931, in and for the County of Los Angeles, in action No. 332470 and entitled LENA G. SMUCKLER, doing business as FRENCH VENEER MANUFACTURING COMPANY, Plaintiff, vs LIQUID VENEER CORPORATION, a corporation, Defendant.

4. Petition of Liquid Veneer Corporation, a corporation, Defendant, for removal of said Superior Court action No. 332470 to the District Court of the United States, in and for the Southern District of California, Central Division, and filed in the office of the Clerk of the said Superior Court on the 30th day of March, 1932.

5. Undertaking on removal executed by Aetna Casualty & Surety Company, and filed with the Clerk of said Superior Court on the 30th day of March, 1932.

6. Minute Order of the Superior Court, in and for the County of Los Angeles, granting the Petition of the Liquid Veneer Corporation, a corporation, for the removal of said Superior Court action No. 332470 to the District Court of the United States, in and for the Southern District of California, Central Division, and made on March 30, 1932.

7. Formal order of the Superior Court of the State of California, in and for the County of Los Angeles, removing said Superior Court action No. 332470 to the District Court of the United States for the Southern District of California, Central Division, signed and filed on March 20, 1932.

8. Certificate of L. E. Lampton, Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, certifying and forwarding to the Clerk of the United States District Court, in and for the Southern District of California, Central Division, the documents in connection with the removal of said cause

of the Superior Court, No. 332470 to the latter Court and dated the 25th day of April, 1932.

9. Minute Order dated November 7, 1932, granting Motion to Quash service of summons.

10. Certificate of the Secretary of State of the State of California, dated March 2, 1932, and filed in this proceeding on the 22nd day of December, 1932.

11. Answer of Defendant, Liquid Veneer Corporation, a corporation, filed on November 8, 1933.

12. Amendment to complaint filed May 9, 1935.

13. Amendment to Answer filed May 9, 1935.

14. Verdict of the Jury.

15. Judgment entered in this cause and recorded on the 10th day of May, 1935.

16. Order of the District Court upon Defendant's Motion for New Trial.

17. Notice of filing and lodging Bill of Exceptions and hearing on settlement of same.

18. Motion of Plaintiff to strike proposed Bill of Exceptions and opposition to settling of same, and Points and Authorities.

19. Points and Authorities of Defendant in opposition to motion of Plaintiff to strike proposed Bill of Exceptions, and filed December 16, 1935.

20. Verified declaration of W. G. Danielson, filed December 16, 1935.



21. Bill of Exceptions and order of the District Court settling the same.

22. Petition for appeal and order allowing appeal.

23. Assignment of Errors.

24. Bond on appeal.

25. Citation on appeal.

26. Stipulation and order for transmission of originals of Plaintiff's Exhibits 9, 10, 11, 12, 17, 18 and 19 to the Clerk of the Circuit Court.

27. Stipulation covering omission of captions at the top of pleadings indicating name of cause and Court from printed transcript of record.

28. This Praeipce.

29. Clerk's certificate to the record.

DATED: This 23rd day of December, 1935.

BICKSLER, PARKE & CATLIN  
PAUL V. SHEEHAN

BY W. G. Danielson

Attorneys for Liquid Veneer Corporation, a corporation.

[Endorsed]: Received copy of the within Praeipce this 27 day of Dec 1935 Harry Graham Balter Attorney for Pl. Filed Jan 2— 1936 R. S. Zimmerman, Clerk By Robert P. Simpson Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 296 pages, numbered from 1 to 296 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; bond on libel; petition for removal, undertaking on removal; minute order of March 30, 1932, granting petition for removal; order for removal; certificate of the Clerk of the Superior Court of the State of California in and for the County of Los Angeles certifying and forwarding certain documents to the Clerk of the United States District Court; order of November 7, 1932, granting motion to quash; summons; certificate of Secretary of State of the State of California filed December 22, 1932; answer; amendment to complaint; amendment to answer; verdict of the jury; judgment; order of September 27, 1935, denying defendant's motion for a new trial; notice of filing and lodging bill of exceptions; bill of exceptions; motion to strike proposed bill of exceptions and opposition of same; points and authorities of defendant in opposition to motion of plaintiff to strike proposed bill of exceptions; verified declaration of W. G. Danielson; petition for appeal and order allowing same; assignment of errors; bond on appeal; stipulation and order re transmission of original exhibits; stipulation re omission in printed transcript per captions and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is \$            and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of February, in the year of Our Lord One Thousand Nine Hundred and Thirty-six and of our Independence the One Hundred and Sixtieth.

R. S. ZIMMERMAN,  
Clerk of the District Court of the  
United States of America, in  
and for the Southern District  
of California.

By

Deputy.